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IN THE

Supreme Court of the United States

October Term, 1964

No. 825

EBER BROS. WINE & LIQUOR CORPORATION,
Petitioner,

v.

THE UNITED STATES,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

To the Honorable Earl Warren, Chief Justice of the United States, and to the Honorable Associate Justices of the Supreme Court of the United States:

Petitioner respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Claims entered in the above-entitled case on October 16, 1964.

Opinion Below

The opinion of the Court of Claims (Appendix B, *infra*, p. 3a) is reported in 337 F. 2d 624.

Jurisdiction

The judgment of the Court of Claims (see Appendix B, *infra*) was entered on October 16, 1964. The jurisdiction of this Court is invoked under 28 U. S. C. §1255(1).

Question Presented

Whether a bill, passed by both houses of Congress, and physically delivered by Congress, in accordance with established practice, to the Office of the President at the Seat of the Government,[1] *was, by such delivery, "presented" to the President within the meaning of Article I, Section 7, Clause 2 of the Constitution,* and so became law when not returned by the President to the Congress within ten days of such delivery (Sundays excepted), Congress not having previously adjourned, when the President had been abroad at the time of the delivery of the bill to his Office and thereafter returned the bill to Congress with a message of disapproval within ten days of his arrival in the United States.

Constitutional Provision Involved

"Every Bill which shall have passed the House of Representatives and the Senate, shall, before it becomes a Law, be presented to the President of the United States; If he approves he shall sign it, but if not he shall return it, with his Objections to that House in which it shall have originated, who shall

1. U. S. Const. art I, §8, cl. 17.

enter the Objections at large on their Journal, and proceed to reconsider it. If after such Reconsideration two thirds of that House shall agree to pass the Bill, it shall be sent, together with the Objections, to the other House, by which it shall likewise be reconsidered, and if approved by two-thirds of that House, it shall become a Law. But in all such Cases the Votes of both Houses shall be determined by yeas and Nays, and the Names of the Persons voting for and against the Bill shall be entered on the Journal of each House respectively. *If any Bill shall not be returned by the President within ten Days (Sundays excepted) after it shall have been presented to him, the same shall be a Law, in like Manner as if he had signed it, unless the Congress by their Adjournment prevent its Return, in which Case it shall not be a Law.*" U. S. Const. art. I, §7, cl. 2 (italics supplied).

The text of the bill in question, H.R. 2717, 86th Cong., 1st Sess. (1959), is set forth in Appendix A, *infra*.

Statement

This suit was brought by petitioner in the Court of Claims under 28 U. S. C. §1346 and §1491[2] for the refund of income taxes overpaid by petitioner. The respondent asserted the Statute of Limitations as its only defense. (See Answer, Record, pp. 24-25.) That defense had been expressly barred by the terms of H.R. 2717, 86th Cong., 1st Sess. (1959) (see Appendix A, *infra*), passed by both Houses of Congress and delivered to the Office of the President at the White House on August 31, 1959. From

2. Additional statutory bases for the claim are set forth in the Petition below, Paragraph 12 (Record, p. 4).

August 26 to September 7, 1959 the President was out of the country. On September 14, he returned H.R. 2717 to the House of Representatives with a message of disapproval. Congress adjourning at 6:22 a.m. on September 15, the bill was not reconsidered.[3]

Upon these facts the court below found that, if H.R. 2717 was "presented" to the President on August 31, 1959 and consequently became law upon the expiration of ten days (Sundays excepted), "plaintiff is entitled to a refund for the overpayment of income taxes in a total amount of $150,634.18" plus interest (Finding of Fact 4).[4] The court concluded, however, that H.R. 2717 was not "presented", within the meaning of Article I, Section 7, Clause 2 of the Constitution[5] until September 7, 1959, the date of the President's arrival in the United States, and that his return of the bill to the House of Representatives on September 14, 1959 with his disapproval accordingly constituted an effective veto thereof. The court thereupon dismissed plaintiff's suit as barred by the Statute of Limitations.

The sole issue in the case was whether H.R. 2717 was "presented" to the President within the meaning of Section 7 when it was delivered to his Office on August 31, 1959.

1. *The Passage of H.R. 2717.* "A Bill for the Relief of Eber Brothers Wine and Liquor Corporation", H.R. 2717, 86th Cong., 1st Sess. (1959), waiving the Statute of Limita-

3. 105 Cong. Rec. 19688, 19749 (Sept. 14, 1959).

4. The parties have so stipulated. Record, p. 29. The Findings of Fact by the Court of Claims are set forth in Appendix B, *infra*, p. 3a at pp. 21-42, and are cited herein as "Finding ——".

5. Hereinafter referred to as "Section 7".

tions as to petitioner's claim for the refund of an overpayment of income taxes for its fiscal years 1947 and 1948, was introduced in the House of Representatives on January 15, 1959 (Finding 2). The bill was duly referred to the cognizant House Committee, which, having considered a Treasury Department report opposing passage of an identical bill previously introduced (see Record, pp. 16-17), unanimously recommended passage (H. Rep. No. 118, 86th Cong., 1st Sess. (1959)). The House passed the bill on March 17, 1959 (Finding 2). The cognizant Senate Committee likewise unanimously recommended passage (S. Rep. No. 758, 86th Cong., 1st Sess. (1959), reprinted at Record, p. 13), and the Senate passed the bill on August 27, 1959 (Finding 2). The bill was duly enrolled, signed by the presiding officer of the Senate and by the Speaker of the House and sent to the Committee on House Administration for presentation to the President (*ibid.*).

2. *Delivery of H.R. 2717 to the Office of the President.* On August 31, 1959, H.R. 2717, with twelve other bills, was physically delivered to the White House by a clerk of the Committee on House Administration (Finding 6). All thirteen bills were accepted by Mr. Tom Jones, a legislative clerk on the White House staff, who signed receipts therefor in the customary form:

WHITE HOUSE

Washington, D. C.

RECEIVED from the Committee on House Administration of the House of Representatives the following enrolled House Bills:

* * *

(See Findings 5, 6). The procedure thus followed for the delivery and receipt of enrolled bills by Congress to the President—by an agent of the Congress to a legislative clerk of the White House, rather than personal delivery to the President himself—has obtained "at least since 1931, and for some period of time prior thereto, the duration of which is uncertain" (Finding 5). Accordingly, upon the return to the House of Representatives of the White House receipt for H.R. 2717, a notation was made in the House Journal for August 31, 1959 in accordance with the usual practice[6]:

> "MR. BURLESON, from the Committee on House Administration, reported that that Committee did on this day *present to the President for his approval* a bill of the House of the following title:
>
> * * *
>
> "H.R. 2717 * * * A bill for the relief of Eber Brother Wine and Liquor Corporation * * *." (italics supplied).[7]

The Journal for August 31, 1959, containing this notation, was read and formally approved by the House the following day. See 105 Cong. Rec. 17539 (Sept. 1, 1959).

3. *The Expiration of Ten Days (Sundays Excepted) without Presidential Action.* Upon delivery of H.R. 2717 and the twelve other bills to the White House on August 31, they were immediately referred by the President's staff to the Bureau of the Budget and were processed in the normal

6. The House is required to keep a Journal under the Constitution. U. S. Const. art. I, §5, cl. 3.

7. A similar notation appeared in the *Congressional Record* for August 31, 1959 (Finding 6: 105 Cong. Rec. 16022 (Aug. 31, 1959)).

manner in which bills are processed following presentation (Finding 7). H.R. 2717 was returned to the White House with the recommendations of the Bureau of the Budget and the Treasury Department on September 5 (*ibid.*). The other twelve bills were approved by the President on September 8 and September 9, all within ten days following their delivery to the White House. The President, however, took no action on H.R. 2717 until September 14, twelve days (Sundays excepted) after its delivery. At that time he returned H.R. 2717 with a message of disapproval to the House of Representatives (Finding 2), which was then in recess awaiting adjournment.

The Senate being notified later that day that a "veto" message had been received, Senator Keating of New York inquired on the floor of the Senate whether H.R. 2717 had not automatically become law upon the expiration of ten days (Sundays excepted) following its delivery to the office of the President on August 31, 1959. The Presiding Officer of the Senate stated that the question was "for the courts to decide." 105 Cong. Rec. 19553 (Sept. 14, 1959). This colloquy on the Senate floor is set forth in Appendix C, *infra*, pp. 6a-8a.

4. *The President's Absence.* On August 26, 1959, five days before the delivery of H.R. 2717 to the White House, President Dwight D. Eisenhower left the United States for Europe; he was to return on September 7 (Finding 8). On the occasion of an earlier trip abroad to Geneva in 1955, the Attorney General had suggested to the President:

> "that you confer with leaders in Congress so that arrangements can be made under the law for enrolled

bills or joint resolutions *to be held in Congress* until your return.

"In this way, your attention to the important matters raised in Summit Talks will not be diverted by consideration of bills which may safely await your return.

"If Congressional leadership believes that the matter is serious enough to warrant your immediate attention, it should be advised to forward the bill to the White House with this understanding:

1. *That the entries on the House and Senate Journals will carry the statement: 'Delivery to the White House for forwarding to the President.'* " Memorandum of Attorney-General Brownell, July 5, 1955, Plaintiff's Exhibit 3, reprinted in Appendix C, *infra*, page 5a (italics supplied).

Prior to his departure for the trip here in question in August 1959, the President had "indicated his desire" to some unidentified person or persons on his staff that "*so far as possible*, he wanted Congressional bills to be held in Washington until his return"[8] (Finding 17) (italics supplied).

The President's "desire", however, was not implemented in the case of H.R. 2717 by either of the alternative methods proposed by the Attorney General in 1955: it was not held in Congress until the President's return, nor

8. The President's "desire", as thus found by the court, is ambiguous as to the manner in which he desired bills to be held in Washington, or as to what was understood by "so far as possible." Presumably, he meant "so far as possible" under the Constitution. The President might have meant (in accordance with the 1955 memorandum of Attorney-General Brownell (see text immediately *supra*)) that he wished his staff to arrange, "so far as possible", that Congress delay delivering bills to the White House until his return, and thus clearly delay their "presentation" to him.

did the House Journal reflect that its delivery to the Office of the President was "for forwarding" to him.[9] Instead, two of the President's aides, Mr. Gerald Morgan[10] and Mr. William Hopkins[11] "decided that * * * the bills received [by the President's Office] during [the President's] absence should be stamped 'Held for presentation to the President upon his return to the United States' " (Finding 17), "language never before used on prior occasions of Presidential absence from the country" (Finding 8). The legislative clerks on the President's staff were instructed to place this stamp on all bills received at the White House after the President's departure and on all receipts for such bills (*ibid.*).

Prior to the President's departure on August 26, 1959, the President's Deputy Assistant for Congressional Affairs, Mr. Bryce N. Harlow, "discuss[ed] * * * the matter" with "Congressional leaders". The record, however, "does not disclose what was said in these discussions", or even which "Congressional leaders" were present, "since, as the President's agent, Mr. Harlow did not deem it proper at the trial to disclose the detail of the conversation" (Finding 8); nor is there any indication in the Record of any congressional action whatsoever taken pursuant to this "discussion."

Despite the instructions given by the President's aides to the White House staff as to the "Held for presentation * * *" stamp, the normal "Received" stamp was applied

9. On the contrary, it recited that the bill had been "presented to the President" on August 31, 1959 (Finding 6).

10. Deputy Assistant to the President.

11. White House Executive Clerk.

to H.R. 2717 on August 31, 1959. Upon discovering his error, the White House clerk who had receipted for the bill asked the cognizant House clerk to return the original receipt for restamping. When informed that the receipt had already been placed in the files of the Committee on House Administration, the White House clerk then asked that a piece of paper bearing the new stamp be attached to the original receipt; upon the advice of the Parliamentarian of the House, this was not done (Finding 9). And, as already noted, the House Journal states that H.R. 2717 was

> "on this day [August 31, 1959] presented to the President for his approval" (Finding 6).[12]

5. *Treatment of Other Bills During the President's Absence.* A total of 72 enrolled bills were delivered to the White House while the President was abroad (Finding 12). 70 of these bills were acted upon within ten days (Sundays excepted) from the time of such delivery (Finding 13).[13] One (S. 994) was approved twelve days after delivery to the White House (Finding 14), a mere surplusage if delivery was "presentation." The seventy-second bill was H.R. 2717. Accordingly, no other bill delivered to the White

12. The enrolled bill bears the stamp "PRESENTED TO THE PRESIDENT SEP 7 1959" (Finding 10); that stamp was affixed by a presidential clerk *after* the bill had been disapproved by the President on September 14, 1959 (Finding 17).

13. Whether or not one of these 70 bills, H. R. 6596, was acted upon within ten days is an open—although moot—question. If the bill was "presented" on September 3, the date of its delivery to the White House, it was subjected to a pocket veto on September 15. If it was "presented" on September 7, the date of the President's return, the purported "veto" of the bill by the President on September 16 may be valid (although Congress had previously adjourned). (see Finding 13n.)

House during President Eisenhower's absence presents the question raised in this case.[14]

Despite the President's "desire" that "so far as possible" bills be held in Washington, six bills delivered to the White House during his absence were in fact flown to him in Europe by his staff. One of these (H.J. Res. 510) was delivered to the White House two and a half hours after the delivery of H.R. 2717. It was signed in Paris three days later on September 3. Indeed, the President, while in Paris, on the same day vetoed S. 2539, which had been delivered to the White House only the day previous, September 2; the disapproved bill was returned to the Senate on September 4.

In addition, 23 bills which had been delivered to the White House before the President's departure on August 26, 1959 were also flown to Europe for action by him: in the view of the President's staff, "the President had but ten days from the date of delivery to the White House in which to act on the bills" since "the President was in the United States at the time the bills were delivered to the White House" (Finding 15).

Reasons for Granting the Writ

The Importance of the Question

One of the great debates of the Constitutional Convention of 1787 concerned the respective roles of the Congress and the President in the enactment of laws. Article I,

14. But, as the court below noted, the problem is likely to recur with increasing frequency. Opinion, p. 4.

Section 7, Clause 2 of the Constitution (set forth *supra*, pp. 2-3) embodies the resolution of that controversy.[15] Under that provision, bills become law in one of three ways:

(1) By passage by both Houses of Congress, followed by the approval of the President;

(2) By re-passage by a vote of two-thirds of each House of Congress after timely return to the originating House with the objections of the President;

(3) By the expiration of ten days (Sundays excepted) following presentation to the President of a bill passed by

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15. As to the history of the determination to grant the President a qualified rather than an absolute veto, see the following:

a. The Colonial Experience.

Fisher, *The Evolution of the Constitution of the United States* 17-18, 95-96, 161-167 (2d ed. 1910), hereinafter cited as *Fisher;* 4 Elliott, *Debates in the Several State Conventions on the Adoption of the Federal Constitution* 620-21 (1836); 4 Lincoln, *The Constitutional History of New York* 494-496 (1906), hereinafter cited as *Lincoln;* Bryce, *The American Commonwealth* 56-59 (3d ed. 1907); Beard, "Veto Power", *Cyclopedia of American Government* 613 (1914); Norton, *The Constitution of the United States* 41 (1940); 2 Baker, *The Fundamental Law of American Constitutions* 381 (1916).

b. The State Experience: 1776-1787.

N. Y. Const. (1777); Mass. Const. (1780); Warren, *The Making of the Constitution* 185 (1928); Farrand, *The Framing of the Constitution* 145-146 (1913); *Fisher* 17-18, 83-85, 95-96, 161-167; Dougherty, *Constitutional History of the State of New York* 51-52 (2d ed. 1915); Frothingham, *A Brief History of the Constitution and Government of Massachusetts* 94 (1916); 1 *Lincoln* 504-505, 554-555, 589; 4 *Lincoln* 494-496.

c. The Convention.

1 Farrand, *Records of the Federal Convention* 93-114, 138-44 (Rev. ed. 1937); 2 Farrand, *supra*, 73-80, 298-302, 563-64, 585-87; *Notes of Maj. Wm. Pierce*, printed in *The Formation of the Union* 93-94 (House Doc. No. 398, 69th Cong. 1st Sess.) (1927); *The Federalist*, Nos. 69, 73 (Hamilton).

both Houses of Congress, the President not having returned the bill to Congress with his objections and Congress not having adjourned within that period.

These methods have been considered by this Court on five occasions. As to the first method, this Court held that the President's approval was effective if given within ten days after presentation, although Congress was in temporary recess when approval was given. *La Abra Silver Mining Co.* v. *United States*, 175 U. S. 423 (1899). It was subsequently held that such approval was effective although Congress had, in the meantime, adjourned. *Edwards* v. *United States*, 286 U. S. 482 (1932). The second method was treated in *Missouri P. Ry. Co.* v. *Kansas*, 248 U. S. 276 (1919), in which this Court held that a timely veto could be overridden by a two-thirds vote of a quorum of each House, rather than of the entire membership. The other two cases involved the third method. In *The Pocket Veto Case*, 279 U. S. 655 (1929), it was held that the "adjournment" referred to in Section 7 included an interim adjournment between sessions, so that a bill did not become law by this method when Congress had begun such an adjournment less than ten days following presentation of the bill without the President having returned it. And in *Wright* v. *United States*, 302 U. S. 583 (1938), it was held that delivery of a bill with a message of disapproval to the secretary of the Senate while the Senate was in temporary recess constituted a valid "return" of the bill to the Senate, so that the bill did not become law by this method, such delivery having been made within ten days of presentation of the bill to the President.

While each of these cases involved, in one or another sense, questions of when the ten-day period for Presiden-

tial action was applicable, or of what constitutes effective Presidential action within that period,[16] none of them directly involved the equally important question of what action is constitutionally required to *begin* the ten-day period within which the President can effectively disapprove a bill while Congress is in session. In brief, this Court has not yet directly held what constitutes "presentation" of a bill to the President.

The question is of great importance, is directly presented by this case, and it should now be decided by this Court.[17] That it has historically been a matter of considerable doubt is reflected in the conduct and opinions of Presidents,[18] Congresses,[19] and Attorneys-General.[20] It is

16. The Court resolved these questions often only after decades of uncertainty. See, *e.g., Edwards* v. *United States, supra,* at 487-90. Thus, for example, William Howard Taft could write in 1916 that the President could not sign a bill after an adjournment of Congress, although he might do so during a recess. Taft, *The Presidency* 23 (1916). And, until 1932, Presidents customarily repaired to a special office at the Capitol to sign bills prior to Congress' adjournment.

17. See Anthony Lewis, writing on the instant case in The New York Sunday Times, Sec. 4, p. E7, cols. 2-4 (Oct. 25, 1964):

> "One of the astonishing things about this country's constitutional history is how long it has taken for some basic clauses of the Constitution to receive an authoritative interpretation from the Courts."

18. See, *e.g.*, Findings 21, 23 as to the conduct of Presidents F. D. Roosevelt and Eisenhower; see also Finding 22 n. 32 as to such doubt on the part of the State Department.

19. See, *e.g.*, Remarks of Senator Keating, 105 Cong. Rec. 19553-54 (Sept. 14, 1959), reprinted in Appendix C, *infra*; Zinn, *The Veto Power of the President,* 12 F. R. D. 207, 220-24 (Report of Law Revision Counsel to the Committee on the Judiciary of the House of Representatives) (1951), concerning the "inadequacy" of this Court's interpretations of Section 7.

20. See, *e.g.*, Memorandum of Attorney-General Biddle dated November 10, 1943, set forth in Finding 21; Memorandum of Attorney-General Brownell dated July 5, 1955, Plaintiff's Exhibit 3, set forth in Appendix C, *infra,* p. 5a.

a question which is likely to arise with increasing frequency, as the Court below noted:

> "If the recent past is indeed a prologue, the question cannot be dismissed as transient. The combination of increased presidential mobility and concern with foreign affairs together with prolonged congressional sessions is likely to result in a recurrent pattern of presidential travel abroad even while Congress is sitting. The problem will doubtless endure." Opinion, p. 4.

See also *Wright* v. *United States, supra,* where on analogous facts, certiorari was granted "[i]n view of the importance of the question" (302 U. S. at 586). It is submitted that the question presented in the instant case—the reciprocal to that in *Wright*—is no less important.

The Rationale of the Decision Below: The President's Qualified Right Unilaterally to Demand Personal Presentation

The decision of the court below cannot be regarded as authoritatively settling the question. Among other things, it appears to us to be at variance with expressions of this Court in *Wright* v. *United States, supra,* as to which, see *infra,* pp. 21-23. Moreover, to the extent that the decision below *is* treated as defining the constitutional requirements, it enunciates a constitutional test incapable of sure and certain application by reference to official and public records, so as inevitably to raise doubts as to whether particular Acts of Congress have indeed become Laws of the United States.

The court below said, and we agree, that any construction of Section 7 must be tested in terms of "eras of

hostility, coolness, partisan tactics or simple lack of concern," rather than in terms of periods of cooperative understanding as between the Executive and Legislative branches. Opinion, p. 8. For this reason, among others, the failure of the court below to provide a clear and certain constitutional test, so that the constitutional status of bills may readily be ascertained during such times, demonstrates that its construction of Section 7 is not viable.

Holding that delivery of H.R. 2717 to the Office of the President at the Seat of the Government by an agent of the Congress on August 31, 1959 in accordance with time-honored procedure did not constitute "presentation" of the bill to the President within the meaning of the Constitution, the court adopted as its central propositions: (i) that personal presentation to the President is not required by Section 7;[21] but (ii) that the President is constitutionally empowered to demand such presentation. In the court's view, the President may, at his sole option, either "insist that bills be presented to him personally", or "dispense with personal presentation and accept bills through some other procedure." Opinion, p. 9.

In fact, as the court found, "some other procedure"—consisting of delivery to the Office of the President in the White House at the Seat of the Government in Washington, D. C.—has obtained, without variation, for at least the past forty years (Finding 6). This "other procedure" was followed as to H.R. 2717 precisely as it has been as to countless other bills over the years (*ibid.*). Having, however, postulated that the President had the power uni-

21. The court could not comfortably have held otherwise, since delivery to the White House has generally been treated as "presentation" since at least 1931 (Finding 5).

laterally to terminate this "other procedure", the court went on, *ex necessitate*, to qualify the conditions of its exercise. Thus the court held:

> (a) that as a prerequisite to his exercise of this power, the President must have informed Congress "in some manner" that the "other procedure" had been terminated and that personal presentation would thenceforth be required.[22] Opinion, p. 9.

Once the President has so informed Congress, said the court, Congress is obligated to present bills to him personally. But the court further limited this requirement

> (b) if personal presentation is demanded, the President must make himself "reasonably available" for such presentation. Opinion, pp. 9, 10, 11n.

Additionally, the presentation required is not truly personal, since the court added:

> (c) that an "equivalent" to personal presentation would be "delivery to an aide in the immediate vicinity of the President." Opinion, pp. 9, 10, 11n.

The opinion of the court below does not in terms limit the right of the President to demand personal presentation to those occasions when the President is abroad,[23] and,

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22. It is, of course, apparent that, absent some such limitation, the President could defeat all Congressional efforts to present bills to him according to a traditional method by a private, uncommunicated resolve to terminate the practice.

23. The President's staff, however, have invariably treated delivery to the Office of the President while he is in the country as presentation, although he may be far from the Seat of the Government. Findings 15, 23. The court below characterized this practice as merely "precautionary" rather than "determinative". Opinion, p. 12. In the court's view, the President can demand personal presentation "if he wishes" (Opinion, p. 9), "when he feels it important" (Opinion,

indeed, we see no rational basis for so limiting his power, once it is granted that some such power exists. Neither the terms of the Constitution nor the opinion below conditions the exercise of presidential power in general, or specifically his power to receive, approve or disapprove bills, upon the personal *locus* of the President (*cf.* Opinion, p. 6 and authorities there cited): indeed, the President received, approved and disapproved bills while abroad on the trip in question. Nor can distance *per se* justify the creation of a constitutional power in the one instance and not in the other: when the President is in Paris he is closer to Washington than when he is in Honolulu.[24]

Delivery of Bills to the President's Office at the Seat of the Government Constitutes Adequate "Presentation."

The ten-day proviso of Section 7, limiting the President's power to disapprove a bill while Congress has not yet adjourned, is found at the end of the Section, after the provision giving Congress the power to override a presidential veto. The Constitution having conferred on the President only a qualified, and not an absolute veto, the purposes of the ten-day limitation are clear enough: to deprive the President of the power to delay the effective-

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p. 11), or whenever the traditional system "becomes inconvenient or burdensome to him" (Opinion, p. 10).

Article II, Section 1, Clause 5 provides that the Office of the President shall devolve on the Vice President in case of the President's "Inability to discharge the Powers and Duties" of the Office. It has not yet been suggested that the President's absence abroad incapacitates him from discharging his powers and duties to receive bills and to act upon them in accordance with Section 7.

24. Bills delivered to the White House during President Eisenhower's 1960 Far East visit were stamped "Presented to the President" as of the day he landed in Hawaii on his return (Finding 23).

ness of laws beyond the allotted period without affording Congress the opportunity by an appropriate vote to make its bills into laws despite the President.[25] Story, *Commentaries on the Constitution of the United States* §891 (5th ed. 1891); Black, *Handbook of American Constitutional Law* 122 (4th ed. 1927). Moreover, the time limitation has the very practical effect of limiting the time the President may force Congress to remain in session. For if the President could effectively delay the return of bills, Congress would have to remain in session to receive his messages of disapproval, however long delayed, or surrender its power to override his veto.[26]

The question presented by the rationale of the decision below is thus whether the President can, by absenting himself from the Seat of Government and by demanding personal presentation, require Congress, if it is to preserve its power to enact laws over Presidential veto, to remain in session for the additional period physically required to effect personal delivery in some other part of the world. The constitutional question arises in the present case in the context of modern, instantaneous communication, and

25. One of the central complaints articulated in the Declaration of Independence was the Crown's neglect to attend to laws presented for his approval, and consequent suspension of their effectiveness.

26. The significance of this element of delay is apparent in this case. The President returned to the United States on September 7, and Congress adjourned at 6:22 a.m. on September 15. If bills were not deemed presented until the President's return, Congress could have been required to stay in session until after September 18 in order to insure itself an opportunity to override his vetoes.

The Houses of Congress determine the date of their adjournment, except in case of disagreement between the two Houses, in which case the President decides. U. S. Const. art. I, §5; U. S. Const. art. II, §3.

relatively easy and rapid transportation. The governing constitutional clause, however, was written when communication and travel were slow, inconvenient, and unreliable, and when it was simply not to be thought of that the President might be in Europe while Congress was in session. That the Framers did not adopt any principle of "personal presentation" of Congressional bills to the President while abroad is evident enough from this: that a bill "personally presented" to the President in London or in Paris in 1789 and immediately acted upon by him could not, in those days, *physically* have been "returned" to the Congress by the fastest means then available within the ten days allotted after presentation.

The truth is that the notion of "personal presentation" of bills to the President while abroad during a Congressional session was simply inconceivable under 18th Century conditions, while such a doctrine is entirely unnecessary under modern conditions. [27] And, we submit, the principle that the President may leave the Seat of the Government and the country during a Congressional session, and require the Congress to send messengers after him to effect presentation of bills, leaving the risks and delays of such delivery with the Congress, not the President, is not in keeping with the narrowly circumscribed powers over legislation conferred upon the Executive.[28] We submit that the purposes and structure of the clause

27. See p. 11, *supra*.

28. We may wonder at the prospect of the Congress applying to a foreign Government for a visa to permit Congress' messenger to enter the territory of that Government for the purpose of effecting presentation of Acts of Congress to the President while in that country.

are best served by a construction which holds that delivery of bills by Congress to the Office of the President at the Seat of the Government is "presentation" to the President, though the President be temporarily absent.

In *Wright* v. *United States*, 302 U. S. 583 (1938), this Court held that the President had effectively "returned" a disapproved bill to the originating House within the meaning of Section 7, prior to the expiration of ten days following its presentation, by delivering it to the secretary of the Senate, notwithstanding that the Senate itself was then in recess. Holding that Congress could not frustrate the President's power to "return" a bill within the prescribed time by going into temporary recess, the Court analogized the "return" to the very situation at bar—the presentation of a bill to the President during his absence from the White House:

> "There is no greater difficulty in returning a bill to one of the two Houses when it is in recess than in presenting a bill to the President by sending it to the White House in his temporary absence. Such a presentation is a familiar practice." 302 U. S. at 590.

Just as *Wright* held that Congress could not by its recess defeat the President's right effectively to *return* a bill within the ten-day period allotted, we submit that the President may not by his absence from the Seat of the Government frustrate or delay Congress' right effectively to *present* a bill, so as to begin the ten days' running.

The court below distinguished *Wright* solely on the basis of the reference in *Wright* to the secretary of the Senate as the Senate's "accredited agent" (see Opinion,

p. 14, n. 17); in this case, however, it found the President's legislative clerk not so "accredited", his "authorization" having been revoked. But the secretary of the Senate was only *constructively* deemed in *Wright* to be "accredited" for the purpose of receiving bills, in order to effectuate the President's constitutional right to return bills to the Senate during its recess. As the concurring opinion in *Wright* points out (302 U. S. at 599-600), there was nothing in the majority opinion to indicate that the Court was relying upon any actual "authorization" of the secretary by the Senate to receive the return of bills during its recess; or that the secretary was the Senate's "agent" in any general or private sense.

The principle for which petitioner contends, and which *Wright* supports—that delivery of bills to the President's Office is "presentation"—leaves adequate room for practical arrangements to be made, with the concurrence of the Congress, to adapt the law-making process to necessary presidential absence from the Seat of the Government. As at least two Attorneys-General have suggested,[29] the officers and committees of the Congress may, at the request of the President, withhold the signing or delivery of bills to the White House and so delay their presentation under Section 7, if the *Congress* is persuaded that presentation should be thus delayed.

We think that the power to delay presentation when the President is absent must reside in Congress, rather than, as the lower court concluded, in the President, since the ten-day clause is intended to be a limitation upon the Presi-

29. Memoranda of Attorneys-General Biddle and Brownell, *supra*, p. 14 n. 20.

dent's power, and since it is the President who decides whether or not he will be absent. And just as the President must be able to fix the date of return, regardless of Congress' temporary absence, to prevent Congress from *limiting* his power of qualified veto (*Wright* v. *United States, supra,* 302 U. S. at 596-97), so Congress must be able to fix the date of presentation to prevent the President from *expanding* his power of qualified veto.

The Constitutional Scheme Envisioned by the Decision Below is Uncertain and Unworkable

If the writ is granted, petitioner will argue that the only principle which workably fulfills the constitutional scheme is that Congress may at any time "present" bills to the President under Section 7 by delivery to his Office at the Seat of the Government. The alternative constitutional scheme envisioned by the court below makes it uncertain whether particular Acts of Congress have been "presented" in accordance with Section 7 when the President is absent from the Seat of the Government. This result follows ineluctibly from the conditions and qualifications which the Court found necessary to place on its basic principle that the President can unilaterally demand personal presentation.

Recognizing that an unlimited unilateral power to demand personal presentation would permit the President to stop the law-making process by the expedient of making himself unavailable for personal presentation and would be wholly inconsistent with the constitutional scheme, the court below imposed several additional limitations: the President must make himself "reasonably available" for personal presentation; Congress may deliver bills to an

"aide in the immediate vicinity" of the President as the "equivalent" to personal presentation; and the President must "inform" Congress in some way that he requires personal presentation. See Opinion, pp. 9, 10, 11 n. In so limiting its principle of personal presentation, the court below has only substituted the inescapably uncertain for the absolutely unthinkable.

A. "Reasonably available." If the Constitution imposes an obligation on the President to make himself "reasonably available" for the presentation of bills, two questions immediately suggest themselves:

1. What is "reasonably available"?

2. What follows if the President is *not* "reasonably available"?

That the Court of Claims answered neither question is not surprising. A general standard of "reasonableness" requires *ad hoc,* after-the-fact decision in litigation in cases concerning the effectiveness of particular Acts of Congress. It is, for this very reason, unsatisfactory as a principle for determining whether and when bills have been "presented" to the President. The country should not have to wait for a court to decide whether the President's unavailability in a given instance was "reasonable" or "unreasonable" under all the circumstances before it knows whether a particular Act of Congress has become law.[30]

30. *Quaere,* whether the question of the President's "reasonable availability" would not be a question of fact for a jury in private litigation (to which the United States would not necessarily even be a party), determinable by reference not only to the physical accessibility of the President, but also to the Presidential commitments which made it necessary for him to be physically inaccessible for varying periods.

And if the President fails to make himself "reasonably available" for presentation of bills, may Congress *then* deliver such bills to the Office of the President at the Seat of the Government? Does the ten-day period then begin on the first day the President is found to have made himself "unreasonably unavailable"? All these preliminary questions—akin to questions of personal service in private litigation—could cast in doubt the very existence of laws, once one accepts the notion that the President may declare that a formal, institutional delivery of bills to his Office shall not constitute "presentation."[31]

B. Informing the Congress. Having found that to alter the customary procedure of "presentation" by delivery to the President's Office, the President must "inform" the Congress that he requires "personal presentation", the Court concluded that Congress was adequately informed in this case:

> "The Congress was informed of this procedure [that bills would be held by the White House staff until the President's return] by a Presidential aide before the President departed." Opinion, p. 14.

The conclusion and the evidence upon which it was based dramatically demonstrates the unworkability and error of the lower court's qualified principle of personal presentation.

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31. Finding that an "equivalent" to actual personal delivery to the President is "delivery to an aide in the immediate vicinity of the President" (Opinion, p. 9) seems to us incompatible with the underlying principle that the President may revoke the authority of his Office at the seat of the Government. If the court holds that a constitutionally irrevocable authority exists for presentation to aides in the President's vicinity, why does not a similar constructive authority exist at the permanently fixed Seat of the Government (see U. S. Const. art I, §8, cl. 17) where bills have traditionally been presented to the President?

For there is no *official* document or record of any Presidential action either (a) informing Congress that bills had to be delivered to him personally during his trip in order to effect presentation, or (b) declaring that H.R. 2717 was not "presented" to the President when delivered to his Office on August 31, 1959, other than a stamp placed upon the enrolled bill by the President's Office *after* the ten days following delivery to his Office had already expired (Finding 17). No message was sent to Congress reflecting the President's alleged decision that delivery to his office would not be "presentation" (*cf.* Memorandum of F. D. Roosevelt dated November 10, 1943, reprinted in Finding 21). No Public Proclamation or Executive Order was published in the Journal of either House, in the *Congressional Record* or in the *Federal Register*. The official Journal of the House and the *Congressional Record* indicate to this day that H.R. 2717 was "presented" to the President as of the date of its delivery to his Office (Finding 6). And, when the Senate was informed of the President's veto message on the eve of its adjournment, on September 14, 1959, one Senator inquired whether it had not already become law (Appendix C, *infra*, pp. 6a-8a) as the official Journal entries showing presentation on August 31 indicated; he was advised that whether or not it was a law was now a question for the courts.

When the issue did come to court, we find that, according to the decision below, the question of whether the bill is a law depends not upon official records but upon oral testimony by a former Presidential aide concerning a "discussion" between himself and some "Congressional

leaders."[32] Who those "leaders" were, and whether they were in fact the Congressional leaders from the President's (minority) party was not disclosed. Nor was it disclosed what was *said* in that "discussion", since the aide refused to divulge such information at the trial on the grounds that he was acting as a Presidential agent (Finding 8).

In sum, the constitutional precept announced by the Court below contemplates that whether or not an Act of Congress was "presented" to the President, and whether or not it became law, shall depend, not upon official records, but upon how far present or former presidential aides, will go, years after the fact, to disclose the details of conversations with "Congressional leaders", and how far they can successfully invoke claims of official secrets. Only thus, it seems, are we to discover whether Congress was "informed" that formal delivery of bills to the White House was no longer to be deemed "presentation", and consequently whether a particular bill which, according to all *public* records, was "presented" to the President on a certain day was in fact "presented" on that day. The uncertainty and possible abuse to which such a principle can be subject need not be dwelled upon. If anything is clear, it is that some better principle is required to determine whether an Act of Congress has been "presented" to the President.[33]

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32. Since the question of whether an Act of Congress has become a law may arise in cases to which the United States is not a party, such testimony may be given without the Government being represented.

33. *The Pocket Veto Case, supra,* is replete with concern that publicity and certainty attend all phases of the process of the return of a bill to Congress. See 279 U. S. at 684-685. In *Wright,*

The "Ground" of Congressional "Acquiescence"

The court below, having stated its interpretation of Section 7 in Part I of its Opinion, went on to conclude in Part II that Congress had acquiesced in the President's decision that bills delivered to the White House would be received "only for presentation to him upon his return to the United States." It is apparent, however, that the court's reference to Congressional acquiescence did not purport to provide an independent ground of decision. On the contrary, the court's reference to "acquiescence" follows the statement in the same paragraph at page 14 of the court's opinion that:

> "[The President] was free to decide, as he did, that during his absence bills would be received at the White House only for presentation to him upon his return to the United States."

Congressional "acquiescence," in the court's own reasoning thus turns on the main question at issue: whether the President had the unilateral power under the Constitution to determine that bills delivered to his office were not "presented" to him. Indeed, this is made even clearer by the act which the court found to constitute Congressional acquiescence:

> "The Congress, if it did not agree, could have sent the bills to the President in Europe. But it did not

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supra, the Court distinguished *The Pocket Veto Case* by noting that return during a three-day recess of the Senate does not result in "keeping * * * the bill in a state of suspended animation with no certain knowledge on the part of the public whether it was seasonably delivered. * * *" 302 U. S. at 595. It is, of course, apparent that the procedure which the Court found adequate in this case for the President's "informing" Congress of a requirement of personal presentation results in precisely the uncertainty which so concerned this Court.

take that course. * * * *By failing to take the one step which would have had that effect* [of "accelerating" presentation]—*sending the bill abroad through its own messenger—the House must be taken to have acquiesced in the President's new arrangement.*" Opinion, p. 14 (emphasis added).

But the act which the Court suggested would evidence *non*-acquiescence by Congress—personal presentation by Congressional messenger to the President abroad—would appear rather to evidence Congressional *acquiescence* in the President's right unilaterally to demand personal presentation. *Non*-acquiescence in the President's assertion of power to demand personal presentation would seem more clearly evidenced by a refusal to deliver bills abroad and a continuation of the policy of delivery to the President's Office.

The proposition that Congress could have "accelerated" presentation by sending bills abroad, and that Congress accordingly acquiesced by not so "accelerating" presentation is obviously grounded upon the assumption that delivery to the White House does not constitute presentation when the President has so declared. Since that proposition assumes the power in dispute, it does not constitute a separate ground of decision.

Conclusion

Whether or not a bill has been "presented" to the President within the meaning of the Constitution requires a rule which is both simple and certain in its application, and compatible with the general scheme of the Constitution. A rule that the President may, without limitation,

require personal presentation is not compatible, as the court below itself concluded, with the basic constitutional scheme limiting his veto power. A presidential power to require personal presentation, with the qualifications proposed below, may be less at variance with the basic scheme, but only at the price of introducing inadmissible uncertainties as to whether the qualifying conditions have been met. The only principle consistent *both* with the intention of the Framers and with the need for clarity and certainty is that delivery of bills by Congress to the Office of the President at the Seat of the Government constitutes "presentation" within the meaning of the Constitution, and that the President may not unilaterally require some other mode of presentation.

For the foregoing reasons, it is respectfully submitted that this petition for a writ of certiorari should be granted.

Respectfully submitted,

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January 14, 1965.

APPENDIX A

86th CONGRESS
1st Session

H. R. 2717

A BILL

For the relief of Eber Brothers Wine and Liquor Corporation.

[1] *Be it enacted by the Senate and House of Representa-* [2] *tives of the United States of America in Congress assembled,* [3] That notwithstanding any statute of limitations, including [4] the limitations of section 322(b) of the Internal Revenue [5] Code of 1939, the Eber Brothers Wine and Liquor Cor- [6] poration of Rochester, New York, shall be permitted to [7] file its claims under section 322 of the Internal Revenue [8] Code of 1939 for the refund of overpayments of income taxes [9] for fiscal years 1947 and 1948 which resulted from the fact [10] that profit from the sale of certain warehouse receipts was [11] treated as ordinary income when, subsequently, it was estab- [1] lished that such income should have been accorded capital [2] gains treatment under the law; and if those claims are found [3] to be meritorious, authority is hereby provided for the pay- [4] ment of such refunds. [5] SEC. 2. The United States shall not be liable for any [6] interest on any portion of any such claim for any period [7] prior to the date on which such claim is filed with the Secre- [8] tary of the Treasury or his delegate pursuant to this Act.

APPENDIX B

OPINION AND FINDINGS BELOW

(See Opposite ☞)

In the United States Court of Claims

No. 126–60

(Decided October 16, 1964)

EBER BROS. WINE & LIQUOR CORPORATION v. THE UNITED STATES

Justin N. Feldman for plaintiff. *James M. Landis* and *Margaret Taylor* of counsel.

Irving Jaffe, with whom was *Assistant Attorney General John W. Douglas*, for defendant. *M. Morton Weinstein* and *Edna P. Goldberg* were on the brief.

Before JONES, *Senior Judge;* WHITAKER, *Senior Judge;* LARAMORE, DURFEE, and DAVIS, *Judges.*

OPINION

DAVIS, *Judge*, delivered the opinion of the court:

This is a suit on a private bill passed by both Houses which, the plaintiff says, became law when the President failed to veto it within the time prescribed by the Constitution. The defense is that the President validly returned the bill without his approval within the proper time, and that the Congress did not repass the measure. It is agreed that if the bill became law plaintiff is entitled to recover, otherwise not. The only issue is whether the President vetoed and returned the bill "within ten days (Sundays excepted) after it" was "presented to him."

Having been refused (on limitations grounds) a refund of income tax overpayments for 1947 and 1948, plaintiff sought legislative relief. H.R. 2717 of the 86th Congress

745–743—64——1

would waive the time-bar and permit the claims to be considered on their merits.[1] The bill passed the House of Representatives on March 17, 1959, and the Senate on August 27, 1959. It was signed by the Speaker and the presiding officer of the Senate and then delivered by a messenger of the House of Representatives to the White House on August 31, 1959.

On that day President Eisenhower was abroad, on an official visit to nations of the North Atlantic Treaty Organization. He had departed the country on August 26th and he did not return until September 7th. In preparation for this trip, the President had told his staff that, so far as possible, he wanted Congressional bills to be held in Washington until his return. It was decided to stamp bills received at the White House during his absence with the legend, "Held for presentation to the President upon his return to the United States." The White House legislative clerks were instructed to use this stamp on all such bills, as well as on the receipts given to Congress. Before the President's departure, a member of his staff discussed the problem, including the use of this new stamp, with Congressional leaders, but we do not know whether they agreed to the procedure or expressed any view at all.

When H.R. 2717 was delivered to the White House on August 31, 1959, the legislative clerk inadvertently failed, at first, to follow his instructions and did not use the new stamp. He simply noted, in the customary form, that the White House had received the measure. About two-and-a-half hours later, when the oversight came to his attention, he attempted to amend the receipt by adding the words "Held for presentation," etc. This modification was shortly brought to the attention of the House. The new legend was also stamped on the enrolled bill.[2]

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[1] It was highly probable that the elimination of the time-bar would result in a refund since the Internal Revenue Service had already acceded to refund claims raising the same point for non-barred years.

[2] H.R. 2717 and 12 other bills were the first to be received from the House of Representatives after the President's departure (on August 26th). The legislative clerk made the same mistake as to the entire group and that mistake was soon corrected as to the entire group. Previously, the Senate had delivered four bills on August 27th and one bill on August 31st. The new stamp had been immediately used on these prior bills and their receipts. It was also used on the 54 measures which were delivered, during the President's absence, after the group which included H.R. 2717.

Upon the President's return to the United States on September 7th, the White House placed on H.R. 2717 a stamp showing that the bill was presented to him on that date. On September 14, 1959, while the Congress was still in session, the President returned the bill to the House of Representatives with a veto message. This was more than ten days (Sundays excepted) from the time the measure was delivered to the White House on August 31st, but less than ten days (Sundays excepted) from September 7th when the President returned to the country and the White House indicated that the bill had been presented to him. The House of Representatives did not reconsider H.R. 2717 and it was not published as a private law. The Congress remained in session until about daybreak of September 15, 1959.

The theory of President Eisenhower, and of the defendant here, is that in these circumstances the President had the power to direct postponement of presentation to him until his return from abroad. The plaintiff's position is that bills are customarily presented to the President through delivery to the White House and that practice cannot be altered without agreement by both the legislative and the executive branches. Since no such agreement has been shown, the President's time expired, plaintiff says, several days before his veto message, and accordingly H.R. 2717 became law without his signature.

I

The timeliness of the President's return of the bill must be adjudged under the constitutional provision (Art. I, section 7) that "if any Bill shall not be returned by the President within ten Days (Sundays excepted) after it shall have been presented to him, the Same shall be a Law, in like Manner as if he had signed it, unless the Congress by their Adjournment prevent its Return, in which Case it shall not be a Law."[3] Every President and every Congress have been

[3] The full text of the constitutional provisions on the President's veto power is as follows:

"Every Bill which shall have passed the House of Representatives and the Senate, shall, before it become a Law, be presented to the President of the United States; If he approve he shall sign it, but if not he shall return it, with his Objections to that House in which it shall have originated, who shall enter the Objections at large on their Journal, and proceed to recon-

governed by these words, but neither the naked language nor the vestments of history furnish a definitive answer to the precise problem before us.[4] That problem lay latent until this century was well launched. President Taft was the first chief executive to leave the continental United States while Congress was in session, but the question was still dormant in his time since no bill was sent to the White House during his absence. Prior to the occasion (in 1959) leading to the present case, the issue of how to handle bills received at the White House during a President's absence abroad arose during the tenures of Presidents Wilson, Franklin D. Roosevelt, Truman, and Eisenhower.[5] If the recent past is indeed prologue, the question cannot be dismissed as transient. The combination of increased presidential mobility and concern with foreign affairs together with prolonged congressional sessions is likely to result in a recurrent pattern of presidential travel abroad even while Congress is sitting. The problem will doubtless endure.

Like most of the Constitution, the simple words of the controlling clause carry the interpreter part way but do not automatically unlock all the doors. The ultimate solution must, as so often, be sought through the principles behind the language. In this instance, that policy has already been

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sider it. If after such Reconsideration two thirds of that House shall agree to pass the Bill, it shall be sent, together with the Objections, to the other House, by which it shall likewise be reconsidered, and if approved by two thirds of that House, it shall become a Law. But in all such Cases the Votes of both Houses shall be determined by Yeas and Nays, and the Names of the Persons voting for and against the Bill shall be entered on the Journal of each House respectively. If any Bill shall not be returned by the President within ten Days (Sundays excepted) after it shall have been presented to him, the Same shall be a Law, in like Manner as if he had signed it, unless the Congress by their Adjournment prevent its Return, in which Case it shall not be a Law.

"Every Order, Resolution, or Vote to which the Concurrence of the Senate and House of Representatives may be necessary (except on a question of Adjournment) shall be presented to the President of the United States; and before the Same shall take Effect, shall be approved by him, or being disapproved by him, shall be repassed by two thirds of the Senate and House of Representatives, according to the Rules and Limitations prescribed in the Case of a Bill."

[4] For a general discussion of the presidential veto, see Zinn, *The Veto Power of the President* (1951), reprinted in 12 F.R.D. 207. Mr. Zinn was and is the Law Revision Counsel of the Committee on the Judiciary of the House of Representatives.

[5] As shown below, the practice during those periods has not been uniform.

articulated by the Supreme Court. "The constitutional provisions have two fundamental purposes; (1) that the President shall have suitable opportunity to consider the bills presented to him, and (2) that the Congress shall have suitable opportunity to consider his objections to bills and on such consideration to pass them over his veto provided there are the requisite votes." *Wright* v. *United States*, 302 U.S. 583, 596 (1938). See, also, *Edwards* v. *United States*, 286 U.S. 482, 486, 493 (1932); *The Pocket Veto Case*, 279 U.S. 655, 677–78 (1929); *La Abra Silver Mining Co.* v. *United States*, 175 U.S. 423, 454–55 (1899). "The faithful and effective exercise of this momentous duty necessarily requires time in which the President may carefully examine and consider a bill and determine, after due deliberation, whether he should approve or disapprove it, and if he disapproves it, formulate his objections for the consideration of Congress. To that end a specified time is given, after the bill has been presented to him, in which he may examine its provisions and either approve it or return it, not approved, for reconsideration. * * * The power thus conferred upon the President cannot be narrowed or cut down by Congress, nor the time within which it is to be exercised lessened, directly or indirectly. And it is just as essential a part of the constitutional provisions, guarding against ill-considered and unwise legislation, that the President, on his part, should have the full time allowed him for determining whether he should approve or disapprove a bill, and if disapproved, for adequately formulating the objections that should be considered by Congress, as it is that Congress, on its part, should have an opportunity to re-pass the bill over his objections." *The Pocket Veto Case*, *supra*, 279 U.S. at 677–78 (footnotes and citations omitted). "Where the President does not approve a bill, the plan of the Constitution is to give to the Congress the opportunity to consider his objections and to pass the bill despite his disapproval. It is for this purpose that the time limit for return is fixed. This opportunity is as important as that of the President." *Wright* v. *United States*, *supra*, 302 U.S. at 596. The time limit is fixed "so that the status of measures shall not be held indefinitely in abeyance

through inaction on the part of the President." *Edwards* v. *United States*, *supra*, 286 U.S. at 486.[6]

These complementary policies interact, of course, with the precise words of the Constitution. The chief linguistic key is the requirement that every bill "be *presented* to the *President*" and should be acted on within ten days (Sundays excepted) "after it shall have been *presented* to *him*" (emphasis added). The Presidency may be an institution but the President is an individual. Constitutional power is vested in his person. Certain actions he can appoint others to take for him, but he alone can approve or veto legislation; that authority cannot be delegated. Whatever the help a President may have, the ultimate decision must be his. And to decide he must have time. He is neither a rubber-stamp nor an instantaneous computer. For many bills action may be easy, but there will always be a considerable number which call for consultation, deliberation, or the gathering of information.

We think, too, that it is now settled that the President's constitutional power, unlike that of some governors of states, can physically be exercised anywhere. See Corwin, *The President: Office and Powers* (4th rev. ed. 1957), pp. 55, 281, 346–47; Miller, *Some Legal Aspects of the Visit of President Wilson to Paris*, 36 Harv. L. Rev. 51, 57, 60, 61, 62, 72, 76–77, 78 (1922). The District of Columbia is the seat of government (4 U.S.C. §§ 71–73), but our whole history demonstrates that the President does not lose his authority when he acts outside Washington or the White House; he can and does sign bills elsewhere, whether on official trips or working vacations. The President's official status is not even confined to the United States; many bills have been signed abroad (see findings 20–23). During his term of office the President is vested with his constitutional powers at all times and wherever he may be.[7] Although the District of Columbia is

[6] Under these postulates, the Supreme Court has ruled that the President can approve a bill (within the eleven or twelve days) during an interim recess of the Congress (*La Abra Silver Mining Co.* v. *United States*, *supra*) and after Congressional adjournment (*Edwards* v. *United States*, *supra*); that a "pocket veto" is effective upon the adjournment of the first session of a Congress (*The Pocket Veto Case*, *supra*); and that the President can return a bill without his approval during a 3-day recess of one House (*Wright* v. *United States*, *supra*).

[7] The problem of disability presents different considerations and involves other constitutional texts and tests.

normally his post, he is free to perform his functions at the places he deems appropriate and desirable. He may go or be called anywhere in the country and he may serve abroad.[8]

It is also important that, under the careful words of the Constitution, the President's limited time for considering a bill does not begin until the measure is *presented* to him. That period does not mechanically commence at the end of the passage of the bill through the Congress. A further step is necessary, and the initiation of that step—presentation to the President—lies with the Congress. It has not been unknown for Congressional leaders to delay, for one or another reason, the presentation of bills to the President. See Miller, *supra*, 36 Harv. L. Rev. at 68, 76; Corwin, *supra*, pp. 281, 473–74. Conversely, the routine process of presentation can be accelerated if there be need. Always, however, the time for the President's deliberation runs from the bill's presentation to him.

From this review of the Constitution's phrasing and of the Constitution's policy there emerges a linked series of significant considerations: The President alone can approve or disapprove a bill. At any particular time, he can lawfully be at any place he deems appropriate, and he can lawfully take action there; in particular, it is inherent in his position that he can properly go abroad while and as President. In no case, however, does his time to evaluate a bill commence until it is presented to him. A "fundamental purpose of the constitutional provision" is "to provide appropriate opportunity for the President to consider the bills presented to him" (*Edwards* v. *United States*, *supra*, 286 U.S. at 493) and the time given him by the Constitution cannot be "lessened, directly or indirectly" (*The Pocket Veto Case*, *supra*, 279 U.S. at 678). The President, for his part, is not to be free to override the Congressional will by delaying his action beyond the stipulated time or holding a measure in suspense at his own will. Within the constitutional scheme, there is

[8] The last clause of Article I, section 5, of the Constitution seems to imply that the Houses of Congress can, by mutual consent, sit elsewhere than at the seat of Government. Section 27 of Title 2 of the U.S. Code (derived from the Act of April 3, 1794, c. 17, 1 Stat. 353) provides that when the President believes that, "from the prevalence of contagious sickness, or the existence of other circumstances", it would be "hazardous to the lives or health of the members to meet at the seat of Government," he can "convene Congress at such other place as he may judge proper."

large leeway, through mutual arrangement and understanding, for the President and Congress to accommodate each other's needs and interests. But the veto provisions of the Constitution were also designed to apply in eras of hostility, coolness, partisan tactics, or simple lack of concern. If the President feels the need of the full constitutional period, Congress should not be able to diminish it, deliberately or by accident, by delivering bills in such a way that the President would not have the full eleven or twelve days for deliberation and consultation.[9] On the other hand, when Congress affirmatively desires presidential action to be prompt,[10] the President should not be able to evade or prolong the constitutional span by absenting himself or refusing to receive the measure. Neither the President nor the Congress should be free to ignore the other's interests; but neither should be dependent on the other's grace.

We believe that these factors-in-contention are best harmonized, in the spirit of the aphorism that "the Constitution is not a code of administrative procedure, but a frame of government" (*United States* v. *Weil*, 29 Ct. Cl. 523, 546 (1894)), by utilizing the instrument the Constitution has provided through its concept of "presentation"—though personal presentation to the President is not mandatory, either the Congress or the President can insist on such delivery. If personal delivery is not demanded by either side, presentation can be made in any agreed manner or in a form established by one party in which the other acquiesces; that has long been done, for normal occasions, by the continued understanding that delivery to the White House is effective presentation to the President.[11] But the right of either side

[9] On the constitutional plane it is no answer that, in modern times, Presidents have established systems under which reports on bills are routinely made by interested departments and agencies, and that this process can be begun and completed without the personal initiation or even knowledge of the President (*e.g.*, after delivery to the White House). There will always be bills for which a President feels that, despite all the aid he receives, he requires the full period for his personal consideration or consultation, or to resolve doubts. There is also no guarantee that future Presidents will maintain the current system.

[10] To avoid, for instance, a pocket veto at the end of a session, or so that a bill can be put promptly into effect by repassage over a veto.

[11] It is to this arrangement that the Supreme Court pointed when it referred to "presenting a bill to the President by sending it to the White House in his temporary absence. Such a presentation is familiar practice. The bill is sent by a messenger and is received by the President." *Wright* v. *United States*, *supra*, 302 U.S. at 590.

to insist on personal presentation is the device-of-last-resort by which both can ultimately protect their respective interests as sanctioned by the Constitution. This primacy of the right of personal presentation is wholly fitting; it is a natural reading of the directive, that every bill shall before becoming a law "be presented to the President of the United States", that it shall be delivered to him personally (or to an immediate aide)—unless the President is willing to receive it, and the Congress to present it, in some other fashion. See Corwin, *The President*, *supra*, p. 281.[12]

To recapitulate, we see the operation of the constitutional scheme in this way: The President can, if he wishes, insist that bills be presented to him personally by an organ designated by Congress (*i.e.*, through its messenger or committee) wherever he may be; as a corollary, the President must make himself reasonably available to the Congressional messenger or committee if he desires a personal presentation. The President can, however, dispense with personal presentation and accept bills through some other procedure. He has the choice of a method, short of personal presentation, which he is willing to accept at any particular time; the Congress has the right to rely on and follow such a procedure established by the President until it has been informed, in some manner, that a new system has been substituted. But at any time if the Congress desires a speedier presentation, it can reject a substitute procedure established by the President and insist on personal presentation, in reasonable circumstances, and the President has to make himself available (or offer an equally speedy acceptance). Conversely, the Congress (or the presenting House) can stand on personal presentation or its equivalent (delivery to an aide in the immediate vicinity of the President), or it can establish its own system of presentation, other than personal, in which the President can acquiesce so long as he wishes.

[12] In the Legislative Reorganization Act of 1946, Rule XI of the Rules of the House of Representatives was amended to provide that the Committee on House Administration should present enrolled bills, "when they shall have originated in the House, to the President of the United States *in person*, and report the fact and date of such presentation to the House." 60 Stat. 812, 826 (emphasis added). The provision in the 1946 Act for the Senate Committee on Rules and Administration was the same (60 Stat. 812, 820), but apparently has since been changed. Section 106 of Title 1 of the U.S. Code directs that enrolled bills shall be "sent to the President of the United States".

When the Congressional system becomes inconvenient or burdensome to him, the President is free to proffer his own method or to demand personal presentation (or the equivalent). In any event, the President's time to consider the bill begins with its presentation to him under this scheme. The sum of it is that a President who desires to do so can initially determine how and when bills are to be presented to him, but his choice is always subject to be overridden by a Congress which wishes to accelerate presentation by personal delivery to the President or his immediate entourage.

For a President embarking on a trip abroad, there are various choices. He can, if he is adamant, demand that the Congress make personal presentation to him abroad or delay until his return. It is more likely that he will direct that bills be accepted at the White House as if he were present, or that they be forwarded by his staff for presentation to him overseas, or that they be held at the White House to await his homecoming. Presumably the last alternative will be used when the foreign journey is expected to occupy the President's full time so that consultation on legislative matters would be inconvenient or impossible. The Congress may well accede to the arrangement the President selects. But if Congress (or the presenting House) is dissatisfied with that plan and cannot induce the President to modify it, the Congress always has the option of itself sending the bill abroad and presenting it to the President (who has to make himself reasonably available for that purpose).

In this way there is full play to the overall constitutional mechanism of checks and balance as incorporated into the veto provisions. "[A]s bills multiply" (*Edwards* v. *United States*, *supra*, 286 U.S. at 493) and legislative sessions lengthen, the Congress cannot forestall the President from enjoying the full span allowed him by the Constitution (if he wishes it) by employing a "presentation," not to *him*, but to his "home office" while he is away and otherwise occupied.[13] On the other hand, Congress can, if it wills, prevent a President—insufficiently attentive to legislative needs or

[13] Similarly, if the Congress were meeting outside of Washington, see footnote 8, *supra*, the President could not return a bill without his approval by sending it to the Capitol in Washington—unless there was an arrangement or understanding to that effect.

desirous of unduly delaying his action on a bill—from using the device of an absence from Washington or the country as an excuse for postponing action; Congress can start the constitutional period running by seeking out the President and presenting the bill to him wherever he is. The separate action of the President and of Congress need not wait upon agreement with the other; nor can the hostility of one deprive the other of rights. Each side can take independent steps to preserve the interests granted it by the Constitution. In a time of political or ideological combat between legislative and executive, the President need not curtail trips abroad which he considers necessary out of fear that the Congress will immediately deliver to the White House bills it feels he might reject if he had the time. Congress, on the other hand, need not worry that a hostile President will unnecessarily absent himself from Washington so as to delay, for unacceptable motives of his own, his action on bills or in order to await the end of the session (with its weapon of a pocket veto).[14] The President, when he feels it important, can set the time of presentation so that it will not interfere with other activities abroad (or outside of Washington) and thus require the Congress to take affirmative action to present the bill to him personally if it dislikes the arrangement he makes. Congress, when it desires earlier presentation, can always arrange, itself, to present the measure to the President wherever he is.[15]

We are not barred from adopting this reading of the Constitution by the history of, or the practice under, the veto provisions. As with other problems in this area, the proceedings in the constitutional and ratifying conventions are of little aid in solving the particular problem before us. *Cf. The Pocket Veto Case*, *supra*, 279 U.S. at 675; *Edwards* v. *United States*, *supra*, 286 U.S. at 487. Nor is the teaching of presidential practice more helpful. When the President

[14] To avoid pocket vetoes, Congress can also prolong its sittings until the beginning of the next session. This was done during Reconstruction days. See McKitrick, *Andrew Johnson and Reconstruction* (1960), pp. 12, 277, 499.

[15] We have noted above that it is a postulate of the constitutional provision regarding the veto that the President shall hold himself reasonably available for personal presentation, if that would be speedier than the method he himself selects. Delivery to an authorized aide in the President's immediate entourage would undoubtedly be equivalent to personal delivery to the President.

has been in the country, the assumption of the White House staff seems to have been (at least in recent years) that delivery to the Executive Mansion necessarily constituted presentation, even though the President might be at a distant point and may have desired to postpone presentation until his return to Washington. See findings 15, 17, 23. This assumption appears, however, to have sprouted without much testing or formal consideration. The routine method of presentation through delivery to the White House seems to have been accepted without question during presidential travels within the United States and, so far as we know, no efforts have been made at those times to limit or withdraw the authority of the legislative clerks at the White House to receive bills. This routine continuance of the regular procedure during the President's domestic travel, apparently because it did not cause any grave inconvenience, must be classed as a "precautionary practice" (*United States* v. *Weil*, *supra*, 29 Ct. Cl. at 548) rather than a "determinative" one (*Edwards* v. *United States*, *supra*, 286 U.S. at 487). "The question now raised has not been the subject of judicial decision and must be resolved not by past uncertainties, assumptions or arguments, but by the application of the controlling principles of constitutional interpretation." *Wright* v. *United States*, *supra*, 302 U.S. at 597–98.

The practice during the overseas absences of Presidents Wilson, Franklin D. Roosevelt, Truman, and Eisenhower is inconclusive, but we think that it indicates, at the least, that each of those Presidents acted, at one or another time, contrary to the assumption that delivery of a bill to the White House necessarily constituted delivery to the absent President.[16] President Wilson signed four bills, of the five forwarded to him abroad, more than ten days (Sundays excepted) after their delivery to the White House. President Roosevelt vetoed one bill, and signed two, more than the constitutional period after their delivery to the White House; before one of his wartime trips he specifically informed the Vice President and the Speaker that "the White

[16] The details of the overseas practice of these Presidents, so far as we know it, are set forth in findings 12–23. We have no information on the practice during President Kennedy's administration or whether the problem was a "live" one at that time.

House Office will not receive bills or resolutions on behalf of the President but only for the purpose of forwarding them. As soon as received by the President their presentation to the President will have been completed in accordance with the terms of the Constitution." In addition, with respect to several bills received during President Roosevelt's absences he took pains to indicate that they had been presented to him later than the day they were received at the White House. President Truman signed four bills and vetoed one bill, and possibly three others, more than ten days (Sundays excepted) after delivery to the White House; in his case, too, many of the bills forwarded during his absences have a notation that they were "presented to the President" on some date following that of the delivery of the bill to the White House. President Eisenhower's practice during his 1959 trip, involved here, shows that he considered the bills received during that period not to be presented to him until his return; on an earlier trip (in 1955) the White House received the bills "for forwarding to the President"; on a later trip (in 1960) bills were also received at the White House "for presentation to the President upon his return to the United States." These instances do not prove any binding custom as to the precise meaning of "presentation," but they do show that there is no positive custom or practice that delivery to the White House amounts to presentation when the President has indicated otherwise. They also show that the Presidents have not always felt bound to make arrangements with Congress as to the form of presentation. Insofar as Presidents, while abroad, have attempted to pass on many bills within the constitutional period after delivery at the White House, their actions appear (in some instances at least) to indicate "the existence of doubt and the desire to avoid controversy." See *Edwards* v. *United States*, *supra*, 286 U.S. at 487.

For like reasons we find nothing conclusive in the Congressional treatment of bills delivered to the White House during a President's absence. Even if Congress had consistently treated such bills as presented to the President, that handling would not create a binding custom or practice in view of the different presidential treatment of such bills. Neither Congress nor the Executive, alone, can create in this area a deter-

minative practice. But the fact is that the Congressional handling of these measures has not been uniform. Sometimes the House has phrased its Journal or Congressional Record entries as reflecting the delivery of a bill to the White House for presentation to the President or for forwarding to the President or for the President's approval; sometimes the House phraseology indicated, as in the ordinary case, that the measure had been presented to the President. The Senate seems to have used the latter phrasing consistently. Both because the Congress cannot unilaterally establish a binding custom on this point and because the Congress has not followed a uniform policy, we conclude that there has not been "a practical construction so positive and consistent as to be determinative." *Edwards* v. *United States*, *supra*, 286 U.S. at 487.

II

Under the principles discussed in Part I, there is no doubt that President Eisenhower's veto of H.R. 2717 was timely. He was free to decide, as he did, that during his absence bills would be received at the White House only for presentation to him upon his return to the United States. The Congress was informed of this procedure by a presidential aide before the President departed. It was also told of the change in practice via the stamps which were prepared for the bills themselves and for the receipts, on delivery of the bills to the White House. The Congress, if it did not agree, could have sent the bills to the President in Europe. But it did not take that course. Aware through its leadership of the President's new arrangement, the House sent its messenger to deliver H.R. 2717 at the White House. When it was again informed through the stamp that presentation would be delayed until the President's return, the House took no action to accelerate presentation. By failing to take the one step which would have had that effect—sending the bill abroad through its own messenger—the House must be taken to have acquiesced in the President's new arrangement.[17]

[17] Plaintiff mistakenly relies on the holding in *Wright* v. *United States*, *supra*, 302 U.S. 583, that the President could return a bill to the Senate, during a three-day recess of that body, by delivering it to the Secretary of the Senate. In *Wright*, the Secretary was "the accredited agent of the legislative body" (*id.* at 590), authorized to receive such messages from the Presi-

Nothing turns on the mistake of the White House legislative clerk in failing to use the new stamp on H.R. 2717, and the receipt therefor, when the bill was first delivered. The clerk did not have authority to accept the bill for immediate presentation to the President; his prior authority, used while the President was in this country, had been withdrawn and new instructions issued. Congress had earlier been informed of this change. Under the new directions the clerk was powerless to accept the bill on any terms other than for presentation to the President on his return. Moreover, the mistake was corrected within three hours and the House was in no way prejudiced. It is appropriate to note, again, that "the Constitution is not a code of administrative procedure, but a frame of government." *United States* v. *Weil*, 29 Ct. Cl. 523, 546 (1894).

Similarly, it is unimportant that the House Journal and the Congressional Record indicated that H.R. 2717 was presented to the President for his approval on the day the bill was delivered to the White House. Since the House had been informed of the President's special arrangement during his absence—in general, before his departure, and with specific reference to H.R. 2717, on the same day it was delivered to the White House—the House could not unilaterally declare that the routine procedure was nevertheless effective. Moreover, the habitual wording of these entries is counterbalanced by the habitual actions of the Congress upon receipt of the veto message. The House, the originating body, recorded the vetoes (105 Cong. Rec. 19697) and took no further action. The Senate later included H.R. 2717 in a list of vetoed measures.[18]

For these reasons, we hold that plaintiff is not entitled to recover and that its petition is dismissed.

WHITAKER, *Senior Judge*, concurring:

I am in thorough agreement with the conclusion reached by the majority in this case, and with most that is said in

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dent, while the legislative clerk in the present case was neither accredited nor authorized. See Corwin, *The President*, *supra*, at p. 280; *Building Commission* v. *Jordan*, 254 Ala. 433, 48 S. 2d 565 (1950); *Cammack* v. *Harris*, 234 Ky. 846, 29 S.W. 2d 567 (1930).

[18] See "Presidential Vetoes: List of Bills Vetoed and Action Taken Thereon by the Senate and House of Representatives, First Congress through the Eighty-Sixth Congress, 1789–1961" (G.P.O. 1961).

justification of this conclusion. However, since there are some expressions and some inferences and some reservations in it with which I am not wholly in accord, I file this concurring opinion. For instance, I think by long-continued usage, presentation to the White House constituted presentation to the President, and that this usage could not be set aside without prior notification to the Congress. Nor do I think it was necessary for Congress to acquiesce in setting it aside. The majority opinion does not so hold, at least not explicitly.

My discussion of the question follows:

We are presented with a novel situation in this case. There are no court decisions on the question presented. The question is, what constitutes presentation to the President of a Bill passed by Congress, within the meaning of Section 7 of Article I of the Constitution, which reads:

> Every Bill which shall have passed the House of Representatives and the Senate, shall, before it become a Law, be presented to the President of the United States; If he approve he shall sign it, but if not he shall return it, with his Objections to that House in which it shall have originated, who shall enter the Objections at large on their Journal, and proceed to reconsider it. * * * If any Bill shall not be returned by the President within ten Days (Sundays excepted) after it shall have been presented to him, the Same shall be a Law, in like Manner as if he had signed it, unless the Congress by their Adjournment prevent its Return, in which Case it shall not be a Law.

Presentation starts the running of the 10-day period, so the question is, what constitutes presentation to the President?

The purpose of the constitutional provision is to give the President a period of 10 days (Sundays excepted) within which to consider the legislation and, within that time, to express his approval or disapproval, if he cares to do so. Since a full 10 days (Sundays excepted) are allotted to him for consideration, it would seem to follow, necessarily, that he might require that the Bill be presented to him in person, in order that he might have the full time.[19] My conclusion in this case is based on that premise.

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[19] *Edwards* v. *United States*, 286 U.S. 482 (1932).

Having that prerogative, it would seem also to follow that, in case he did not desire personal presentation, he had the right to determine the way in which substitute presentation should be made, provided only that this was not more onerous than personal presentation. His determination of the manner of presentation, of course, had to be communicated to Congress, so that that body might comply with its duty to present Bills to the President for his consideration.

Having the right to prescribe the way in which presentation should be made in the first instance, he had the right to change the way from time to time, but, again, he was required to notify Congress of any change, in order that Congress might discharge its constitutional duty.

In the absence of formal notification to Congress of the substitute for personal service, established usage would seem to determine the method of presentation.[20]

Presentation by Congress in the way prescribed marks the beginning of the 10-day period.

These propositions would seem to be fundamental and should guide us to a proper solution of the question presented in this case.

For at least 40 years, no doubt for a much longer time, enrolled Bills have not been presented to the President in person, except in the case of the Bank Holiday Bill of 1933 and Bills passed on the eve of *sine die* adjournment of the Congress. The usage has been for the Committee on Administration of either the House or the Senate, after the Bill has been signed by the Speaker of the House and the Presiding Officer of the Senate, to send a clerk to the White House with the enrolled Bill and deliver it to a legislative clerk in the records office of the White House, who signs a receipt for it. The Committee on Administration then reports to the House or Senate "that this day they presented to the President of the United States, for his approval, the following Bills."

For many years this has been understood to constitute presentation to the President. Usage requires us to hold that it complies with the constitutional requirement for presentation to the President, unless in the instance of any particular Bill, including the particular Bill here under

[20] *Pocket Veto Case*, 279 U.S. 655, 689 (1929).

consideration, action was taken by the President to notify Congress that some other mode of presentation would be required, either personal presentation or otherwise.

Before he left the country on August 26, 1959, the President gave adequate notice to Congress that delivery of enrolled Bills to the White House would not constitute presentation of such legislation to him. H.R. 2717, the Bill involved in this case, was one of the Bills delivered during that period.

This was the second occasion on which President Eisenhower had considered the problem of presentation to him of enrolled Bills during his absence from the United States. Before he departed for the Geneva Conference on July 15, 1955, he had asked the advice of Attorney General Brownell on the proper handling of Bills passed by both Houses of Congress while he was away. The Attorney General had suggested that arrangements be made with Congress so that enrolled Bills would be held until his return or delivered to the White House "for forwarding to the President." The findings do not show whether the President, or his representative, discussed the matter with Congress, but they do show that all Bills delivered to the White House during this time were stamped "Received for forwarding to the President."

Prior to his departure on August 25, 1959, President Eisenhower instructed his staff to stamp all Bills delivered to the White House during his absence: "Held for presentation to the President upon his return to the United States." This decision was informally communicated to congressional leaders, at the President's direction, by his Deputy Assistant for Congressional Affairs.

Since the President had the right to require personal presentation to him, he had the right to notify Congress that during his absence the accustomed substitute would not be acceptable.

When he advised Congress that delivery of Bills to the White House would not be deemed presentation to the President, President Eisenhower followed the example of his predecessors. For example, when President Franklin D. Roosevelt was preparing to leave the country for an extended stay in 1943, he requested advice from his Attorney General as to the proper handling of Bills passed by Congress.

The Attorney General advised him in part:

> The practice of receiving bills at the White House and forwarding them for presentation may also require a measure of cooperation. Probably the custom of treating delivery to the White House as presentation to the President should be negatived by informal Presidential advice to the Vice-President and the Speaker that persons at the White House will, during a given period, be authorized only to forward, and not to receive on behalf of the President, enrolled bills. Such directions should be reflected in the reports of the Committee on Enrollment to their respective Houses announcing the date of presentation of bills to the President.

In rendering this advice, Attorney General Biddle adverted to a practice during President Wilson's administration of varying the form of the report of presentation in the *Congressional Record*, when the President was outside of the country, notifying the originating House that the Bill had been delivered to the White House, instead of to the President.

Upon receipt of this advice, President Roosevelt sent a memorandum to the Vice President and the Speaker of the House of Representatives, reading as follows:

> As I expect to be away from Washington for some time in the near future, I hope that insofar as possible the transmission of completed legislation be delayed until my return. The White House Office, however, in other cases of emergency has been authorized to forward to me any and all enrolled bills or joint resolutions. They will be forwarded at once by the quickest means. The White House Office will not receive bills or resolutions on behalf of the President but only for the purpose of forwarding them. As soon as received by the President their presentation to the President will have been completed in accordance with the terms of the Constitution. *I suggest, therefore, that if any bill is forwarded to the White House, the entries on the House and Senate Journals show "delivery to the White House for forwarding to the President".*
>
> For security reasons I hope that this can be kept confidential for as long as is necessary. [Emphasis in original.]

Since the President had the right to require personal presentation, President Roosevelt was fully justified in notify-

ing Congress that the customary usage of treating delivery to the White House as presentation to the President would not be followed, and in prescribing a different procedure during his absence from the country. The essential element of notification to Congress of the change was fully complied with. Had this been omitted, I think the change in procedure would have been ineffectual.

President Truman, who succeeded to the Presidency upon Mr. Roosevelt's death, did not, prior to his departure for the Potsdam Conference in 1945, take action similar to that of his predecessor in his memorandum to leaders of Congress. Nonetheless, President Truman acted on a number of Bills more than 10 days (Sundays excepted) after delivery to the White House but within 10 days (Sundays excepted) after his return. He may have done so with the understanding that the procedure to be followed during the President's absence, as set out in President Roosevelt's 1943 memorandum, would continue in force during his administration. The Roosevelt memorandum, however, seems to relate only to the particular absence then in contemplation and does not appear to have been intended to apply to any others. But the reasons for the procedure there prescribed would seem to be equally applicable to an absence of any future President, quite as much as to Mr. Roosevelt. In any event, it is clear that President Truman did not regard presentation to a clerk at the White House while he was absent from the country as presentation to him. The Congress appears to have been of the same opinion, for it gave the same treatment to Bills that Mr. Truman purported to veto as it did to all other vetoed legislation. They were referred back to Committee; Congress took no further action upon them, and they were not published as laws.

The record does not show that the procedure during the Truman administration was based on formal notification to Congress that the custom of treating presentation to the White House as presentation to the President would not be followed during his absence; however, we need not concern ourselves with this for it is indisputable that, with regard to the Bill presently before us, President Eisenhower advised Congress that, during his absence from the country, delivery to the White House would not be considered presentation to

the President, and that, if Bills were delivered to the White House, they would be stamped, "Held for presentation to the President upon his return to the United States."

After that notification was given, H.R. 2717, the Bill here in question, was delivered to the White House on August 31, 1959. The President returned it to the House in which it originated on September 14, 1959, with his objections to it. He had returned to the United States on September 7, 1959.

No action was taken by Congress to present the Bill to the President other than delivery of it to the White House. But the President had notified Congress that he would not accept this as the equivalent of personal delivery to him. Since he had the right to insist on presentation to him in person, it must be held that it was not "presented to the President" prior to his return to this country on September 7, 1959. He vetoed it within 10 days thereafter. In my opinion it never became law.

FINDINGS OF FACT

The court, having considered the evidence, the report of Trial Commissioner Lloyd Fletcher, and the briefs and argument of counsel, makes findings of fact as follows:

I. THE NATURE OF THE CASE AND THE ISSUE PRESENTED

1. Plaintiff is a corporation organized and existing under the laws of the State of New York, with offices at 3200 Monroe Avenue, Rochester 18, New York. On or about July 14, 1952, plaintiff filed claims for refund of Federal income taxes paid by it for the fiscal years 1947, 1948, 1949, and 1950, on the ground that, contrary to the decision of the Tax Court of the United States in *Thomas E. Wood*, 16 T.C. 213, it had erroneously reported as ordinary income, rather than as capital gains, profits derived by it from the sale of whiskey warehouse receipts in each of said years. The claims for refund for the fiscal years 1949 and 1950 were allowed and paid by defendant. The claim for 1947 was wholly rejected and that for 1948 rejected in part on the ground that the claim for 1947 and a portion of the claim for 1948 had not been filed within the time allowed by law.

2. On January 15, 1959, "A Bill for the Relief of Eber Brothers Wine and Liquor Corporation" (H.R. 2717, 86th Congress) was introduced in the House of Representatives of the Congress of the United States. That Bill provided as follows:

> * * * That notwithstanding any Statute of Limitations, including the limitations of section 322(b) of the Internal Revenue Code of 1939, the Eber Brothers Wine and Liquor Corporation of Rochester, New York, shall be permitted to file its claims under section 322 of the Internal Revenue Code of 1939 for the refund of overpayments of income taxes for fiscal years 1947 and 1948 which resulted from the fact that profit from the sale of certain warehouse receipts was treated as ordinary income when, subsequently, it was established that such income should have been accorded capital-gains treatment under the law; and if those claims are found to be meritorious, authority is hereby provided for the payment of such refunds. * * *

H.R. 2717, 86th Congress, without amendment, was passed by the Congress of the United States in that it was adopted by the House of Representatives on March 17, 1959, and in identical form by the Senate on August 27, 1959. It was properly enrolled under the procedures of the Committee on House Administration and thereafter presented to and signed by the Speaker in open session of the House. These actions were reported on page 16021 of the *Congressional Record* for August 31, 1959, in material part, as follows:

> ENROLLED BILLS AND JOINT RESOLUTION SIGNED
>
> Mr. Burleson, from the Committee on House Administration, reported that that committee had examined and found truly enrolled bills and a joint resolution of the House of the following titles, which were thereupon signed by the Speaker:
>
> * * * * *
>
> H.R. 2717. An act for the relief of Eber Bros. Wine & Liquor Corp.

In accordance with established procedure, the bill was then sent to the Presiding Officer of the Senate who signed and returned it to the Committee on House Administration for transmission to the White House. H.R. 2717 was de-

livered to the White House on August 31, 1959, under the circumstances more particularly described below. It was returned to the House by the President with a veto message on September 14, 1959, and was not reconsidered by the House nor published as a private law.

3. On or about November 25, 1959, the plaintiff filed claims with the District Director of Internal Revenue, Buffalo, New York, for the refund of the amounts claimed as overpayment of taxes on income for the fiscal years 1947 and 1948. The District Director of Internal Revenue issued a notice of disallowance of the claims for refund on or about January 6, 1960. This suit was timely filed thereafter.

4. If H.R. 2717 became law without the signature of the President on September 11, 1959, plaintiff is entitled to a refund for the overpayment of income taxes in the amount of $117,748.77 for fiscal year 1947 and $32,885.71 for fiscal year 1948, or a total amount of $150,634.48, plus interest from the date the claims were filed with the Internal Revenue Service. If H.R. 2717 did not become law without the signature of the President on September 11, 1959, and was validly vetoed by the President on September 14, 1959, the plaintiff's claims for refund of taxes are barred by the statute of limitations and plaintiff is not entitled to recover in any amount from the United States.

II. THE DELIVERY OF H.R. 2717 TO THE WHITE HOUSE ON AUGUST 31, 1959.

5. At least since 1931, and for some period of time prior thereto, the duration of which is uncertain, bills enacted by the Congress have not been delivered personally to the President but have been delivered by an agent of the Congress to one of the legislative clerks on the White House staff.[21] The customary procedures used by the House of Representatives in accomplishing delivery of its enrolled bills are

[21] A congressional employee with 40 years experience in handling of bills testified that he could recall only two instances of personal delivery of bills to the President. One instance was the Bank Holiday Bill of 1933 which was presented personally to the President by the chairman of the then Committee on Enrolled Bills, and the other was a practice in effect prior to the Supreme Court's decision in the so-called "Pocket Veto Case" of delivering enrolled bills personally to the President in the President's Room at the Capitol on the eve of a *sine die* adjournment.

handled by the Committee on House Administration. After a bill has been signed by the Speaker and Presiding Officer of the Senate, as described in finding 2, *supra*, the Committee prepares a receipt for the bill to be obtained from the White House at the time it is delivered there. The receipt is prepared on a standard form containing the following printed heading:

WHITE HOUSE

Washington, D.C.

RECEIVED from the Committee on House Administration of the House of Representatives the following enrolled House Bills:

* * * * *

At the same time, two copies of a Report [22] are prepared on another standard form, the printed heading of which reads, as follows:

COMMITTEE ON HOUSE ADMINISTRATION

House of Representatives

Washington, D.C.

REPORT

The Committee on House Administration report that this day they presented to the President of The United States, for his approval, the following Bills:

* * * * *

The bill (or group of bills) is then hand-delivered by a clerical representative of the Committee to the White House where the previously prepared receipt is signed by a legislative clerk in the Records Office at the White House. After obtaining the signed receipt, the Committee's representative returns it to the Committee for its files, and copies of the Report above described are turned over to the Journal Clerk and Congressional Record Clerk for printing.

6. The forms and procedures outlined above have not

[22] One copy of the Report is for the House *Journal* and the other for the *Congressional Record*.

varied substantially for at least the past forty years, and they were used and followed in the case of H.R. 2717 (to the extent indicated *infra*). It, and twelve other House Bills, were delivered to the White House at 4:05 p.m., on August 31, 1959, by Mr. John F. Haley, Assistant Clerk of the Committee on House Administration. These thirteen bills were receipted for at the White House by Mr. Tom Jones, one of the legislative clerks on the White House staff. Receipts for these bills were signed by him, bearing the date August 31, 1959, and the time 4:05 p.m., which receipts were returned to the House of Representatives by Mr. Haley. The following notation was thereupon made in the *Journal* of the House:

> Mr. BURLESON, from the Committee on House Administration, reported that that Committee did on this day present to the President for his approval a bill of the House of the following title:
>
> * * * * *
>
> H.R. 2717 * * * A bill for the relief of Eber Brothers Wine and Liquor Corporation * * *.

A similar notation appeared in the *Congressional Record* for August 31, 1959, at page 16022.

7. On the same day that H.R. 2717 was delivered to the White House, as above described, it was referred by the Executive Clerk of the Executive Office of the President at the White House to the Bureau of the Budget for processing and review by the Bureau and other agents of the President in the way in which bills normally are so processed and reviewed. On September 5, 1959, it was returned to the White House for action by the President with the recommendations of the Bureau of the Budget and the Treasury Department.

8. When H.R. 2717 was delivered to the White House on August 31, 1959, the President of the United States, Dwight D. Eisenhower, was outside the continental limits of the United States. He had departed this country on August 26, 1959, for an official visit to various North Atlantic Treaty Organization countries. He did not return to the United States until September 7, 1959.

Prior to his departure from the United States, and pursuant to recommendations by members of his staff, President Eisenhower decided upon the procedure for the handling of bills

received from the Congress during his absence. Shortly before his departure, a stamp was prepared containing on it language never before used on prior occasions of Presidential absence from the country. This language was "Held for presentation to the President upon his return to the United States." The legislative clerks on the White House staff were instructed to place this stamp on all bills and receipts therefor delivered by Congress to the White House after the President's departure from the country.

Also, prior to his departure, the President had sent his Deputy Assistant for Congressional Affairs, Mr. Bryce N. Harlow, to the Congress for the purpose of discussing the problem of legislation to be received shortly before his departure and during his absence. Mr. Harlow did discuss the matter with Congressional leaders, including the language of the stamp above quoted. However, the record does not disclose what was said in these discussions since, as the President's agent, Mr. Harlow did not deem it proper at the trial to disclose the detail of the conversations. See, also, finding 17.

9. The 13 bills, including H.R. 2717, delivered to the White House at 4:05 p.m. on August 31, 1959, were the first bills sent by the House of Representatives to the White House subsequent to the President's departure from the United States on August 26, 1959. As noted above, one of the legislative clerks on duty at the White House, Mr. Tom Jones, signed the receipt for these bills. However, although he had been instructed to do so, he forgot to stamp the receipt with the words "Held for presentation to the President upon his return to the United States." This oversight came to his attention at about 6:30 p.m. of the same day when Assistant Clerk Haley of the Committee on House Administration returned to the Records Office of the White House for the purpose of delivering another House bill, namely, House Joint Resolution 510. Again Mr. Haley dealt with Mr. Jones who, on this second occasion, in addition to signing the receipt and placing the date and time thereon, also rubber stamped the receipt with the words "Held for presentation to the President upon his return to the United States." Upon observing these stamped words, Mr. Haley said, "What is this; what is that?" During the

ensuing discussion, Mr. Jones realized that he had not placed the stamp on the receipt for the earlier 13 bills which included H.R. 2717. He requested Mr. Haley to get the receipt back to him for stamping but was informed by Mr. Haley that the receipt had already been placed in the files of the Committee, and the Reports attached thereto had already been turned over to the respective House clerks for printing in the *Congressional Record* and the House *Journal*.[22] Mr. Jones thereupon placed the stamped notation on small pieces of yellow paper and asked Mr. Haley to staple them to the White House receipt. Mr. Haley agreed to do so, and stated that he would inform the Parliamentarian of the House as to his course of action. On the following morning, Mr. Haley informed the Parliamentarian about the added language being used by the White House in order, as Haley put it, "that the House of Representatives be properly informed as to the change in procedure." On the advice of the Parliamentarian, Mr. Haley did not attach the stamped yellow sheets to the receipt for the 13 bills (including H.R. 2717) which Mr. Jones had forgotten to stamp with the "Held for presentation * * *" language.

The White House receipt prepared by Mr. Haley for House Joint Resolution 510 followed the same format as the receipt prepared for H.R. 2717 and the 12 other House bills delivered earlier that day. It is probable that the Reports of the Committee on House Administration for House Joint Resolution 510, being prepared in the same manner, followed the same format as the Reports of the Committee on House Administration prepared for H.R. 2717 and the 12 other bills. However, as noted above, the White House receipt for H.J. Res. 510 was stamped by Mr. Jones "Held for presentation to the President upon his return to the United States," and the *Journal* and *Congressional Record* entries reflecting the delivery of H.J. Res. 510 to the White House read "did * * * deliver to the White House for presentation to the President, for his approval * * *". This is in contrast to the entries reflecting the delivery of H.R. 2717 (and 12 other bills), the receipt for which Mr. Jones had forgotten to stamp with the "Held for presentation * * *" language. Those entries read

[22] The House had adjourned for the day at 4:48 p.m.

that the Committee on House Administration "did on this day present to the President for his approval * * *"

10. The enrolled bill H.R. 2717 which was delivered to the White House at 4:05 p.m. on August 31, 1959, bears three notations:

1. An oval stamp reading, "THE WHITE HOUSE/AUG 31 1959/RECEIVED";
2. A stamp reading, "Held for presentation to the President upon his return to the United States"; and
3. A stamp reading, "PRESENTED TO THE PRESIDENT SEP 7 1959."

The first two notations were placed on the enrolled bill by Mr. Tom Jones, or one of the other clerks in the Records Office of the White House, immediately or shortly after it had been delivered and the receipt therefor had been signed. The "Held for presentation" stamp was also placed on the "bill card" for H.R. 2717 although it is not known as to when or by whom this was done. A "bill card" is a White House record ordinarily maintained by the White House staff in the regular course of business, which reflects the date of receipt of the enrolled bill at the White House from the Congress, the date the bill is referred by the White House to the Bureau of the Budget, the date of receipt of the recommendations of the Bureau of the Budget, including the recommendations of other interested Government agencies, and the date and nature of the President's action.

11. The Congress was in session at all times material hereto, and did not adjourn until 6:24 a.m. on September 15, 1959. The President did not return H.R. 2717 with his objections to the House, where it originated, within ten days (Sundays excepted) after it was delivered to the White House on August 31, 1959. However, on September 14, 1959, the President signed a veto message stating his reasons for not approving H.R. 2717, and on the same day the bill was returned, accompanied by the veto message, to the House of Representatives. This action by the President took place more than ten days (Sundays excepted) from the time H.R. 2717 was delivered to the White House on August 31, 1959, but less than ten days (Sundays excepted) from the time of the President's return to the United States on September 7, 1959.

III. ACTIONS TAKEN ON OTHER BILLS DELIVERED TO THE WHITE HOUSE DURING PRESIDENT EISENHOWER'S 1959 EUROPEAN TRIP.

12. During President Eisenhower's absence from the continental limits of the United States between August 26, 1959, and September 6, 1959, inclusive, agents of the Congress delivered 49 enrolled Senate bills, 18 enrolled House bills, and 5 House Joint Resolutions to the White House. These 72 bills (including H.R. 2717) were delivered in each instance at the White House to one of the legislative clerks on the White House staff who gave receipts therefor. All of the receipts given for these bills, except for the receipts issued for the delivery of the 13 bills on August 31, 1959 at 4:05 p.m., of which H.R. 2717 was one, bore the notation "Held for presentation to the President upon his return to the United States." Each of the bill cards for the 72 bills also bears the notation "Held for presentation to the President upon his return to the United States." Each of the 72 enrolled bills delivered to and received by the White House during the period August 26, 1959 to September 6, 1959, inclusive, bears the oval stamp reading: "THE WHITE HOUSE/(date)/RECEIVED", and the stamp reading "Held for presentation to the President upon his return to the United States."

All of the bills were processed and reviewed by the Bureau of the Budget and other interested agencies in the normal way, which processing and review usually requires about 5 days after delivery of the bills to the White House. Following the delivery of H.R. 2717 and 12 other House bills to the White House at 4:05 p.m., on August 31, 1959, the delivery of all subsequent House bills during the President's absence from August 26, 1959 to September 6, 1959, inclusive, was reflected in the House *Journal* and *Congressional Record* as follows:

> did * * * deliver to the White House for presentation to the President, for his approval * * *.

Prior to the delivery of H.R. 2717 and 12 other House bills to the White House, the Senate had delivered four bills to the White House on August 27, 1959, and one bill on August 31, 1959, and receipts bearing the notation "Held for presentation to the President upon his return to the United States" were given therefor. The Senate *Journal* and *Con-*

gressional Record entries at all times during the President's absence in 1959 read "presented to the President of the United States, the following * * *."

13. All of the aforesaid 72 bills delivered to the White House during the President's absence from August 26, 1959, to September 6, 1959, inclusive, were acted upon by the President within ten days (Sunday excepted) from September 7, 1959, the date of his return to the United States. Also, with the exception of H.R. 2717 and S. 994, all of the 72 bills delivered to the White House during the aforesaid period were either signed or vetoed by the President within ten days (Sundays excepted) after delivery to the White House.[24]

14. S. 994 was delivered to the White House on September 2, 1959. The enrolled bill has 3 stamped notations on it reading: "The White House/Sep 2–1959/Received"; "Held for presentation to the President upon his return to the United States"; and "Presented to the President Sep 7 1959". Ten days (Sundays excepted) from the date of delivery of S. 994 to the White House expired on September 14, 1959. The President signed the bill on September 16, 1959, and it became Public Law 86–276. The Statutes at Large show the date of this law as September 16, 1959, the date the President signed the bill.

15. Near the end of a session of Congress, it is normally true that the number of bills sent by Congress to the White House will greatly increase. This was the situation at the time of President Eisenhower's trip to Europe here involved. In order to keep abreast of the increasing flow of bills, and in order to obtain Presidential action upon certain bills delivered to the White House (but not fully processed) prior to the President's departure, as well as upon some bills

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[24] Dependent upon the characterization to be given to the President's action, or inaction, it is possible that H.R. 6596 should be included as a third exception in this finding. According to the White House bill card on H.R. 6596, the bill was the subject of a pocket veto. If delivery of H.R. 6596 to the White House on September 3, 1959, was presentation of the bill to the President within the meaning of the Constitution, then the bill became the subject of a pocket veto on September 15, 1959, and H.R. 6596 is not an exception to the above finding. However, on September 16, 1959, the President signed a "Memorandum of Disapproval" of H.R. 6596, and the bill card indicates the date of pocket veto to be September 18, 1959. If the Presidential action of September 16 constituted the actual veto, then H.R. 6596 should be considered an exception to this finding along with H.R. 2717 and S. 994.

delivered thereafter which had received early administrative processing, the President's Special Assistant, Mr. Henry R. McPhee, went to Europe near the end of August 1959, for the purpose of conferring with President Eisenhower regarding bills which were deemed "ready" for Presidential action. Of the bills taken by McPhee to the President in Europe, 23 had been delivered by Congress to the White House prior to the President's departure from the United States. President Eisenhower signed one of those bills on August 29, 1959, and he either signed or vetoed the remaining 22 bills on September 1, 1959. As to these 23 bills delivered to the White House prior to the President's departure from the United States, Mr. McPhee testified that, in his opinion and in the opinion of the other persons on the White House staff who functioned as lawyers, the President had but ten days from the date of delivery to the White House in which to act on the bills. Because the President was in the United States at the time these bills were delivered to the White House, it was their collective opinion that the bills had been "presented to the President," and it was therefore necessary to take them to the President in Europe so that he could act upon them within ten days after the date of delivery to the White House.

In addition, six bills were taken to the President while he was in Europe, all of which had been delivered to the White House after his departure from the United States, and as to which, prior to Mr. McPhee's departure, the normal administrative review had been completed. Of these six bills, four were Senate private relief bills cancelling deportation orders or deeming persons to be lawfully admitted to the United States. All four were signed by the President on September 1, 1959. The remaining two bills in this group were House Joint Resolution 510 and S. 2539. H.J. Res. 510 which had been delivered to the White House at 6:30 p.m. on August 31, 1959,[25] (see finding 9, *supra*), was a continuing resolution providing for temporary appropriations and was signed by the President in Paris on September 3, 1959. S. 2539 was a bill relating to housing and renewal of urban communities which had been delivered to the White House

[25] H.J. Res. 510 had been sent by courier to Mr. McPhee in Paris and there delivered by him to the President.

on September 2, 1959. This bill was also delivered to the President in Paris on September 3, 1959, where on the same day he refused his approval and signed a veto message.[26] S. 2539 was returned to the Senate on September 4, 1959.

16. Except for the six bills referred to in the preceding finding, the President did not act upon any of the other 66 bills delivered by Congress to the White House during his absence from August 26, 1959, to September 6, 1959, inclusive, until after he had returned to the United States on September 7, 1959. The actions taken by the President on these remaining 66 bills after his return may be summarized as follows:

(a) Thirteen bills (including H.R. 2717) were delivered to the White House on August 31. Eight of these bills were signed on September 8, four were signed on September 9, and one (H.R. 2717) was returned to the House of Representatives with a veto message on September 14.

(b) Eighteen bills were delivered to the White House on September 2. Eight of these bills were signed on September 8, six were signed on September 9, three were signed on September 14, and one was signed on September 16.

(c) Twenty bills were delivered to the White House on September 3. Ten of these bills were signed on September 8, eight were signed on September 9, one was signed on September 14, and one pocket veto message was signed on September 16. (See finding 13, footnote 5.)

(d) Fifteen bills were delivered to the White House on September 4. Seven of these bills were signed on September 9, one was signed on September 10, five were signed on September 14, and two were signed on September 16.[27]

17. In addition to the stamp reading "Held for presentation to the President upon his return to the United States," the aforesaid 66 enrolled bills all bear a stamped notation

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[26] Special Counsel to the President, David W. Kendall, had also gone to Europe with Mr. McPhee to discuss with the President a possible veto of S. 2539.

[27] All 66 bills were reviewed by the Bureau of the Budget and other agencies concerned for the purpose of making recommendations thereon to the President. The time interval between receipt of such recommendations by the White House and the taking of action on the bills by the President may be summarized as follows:

(a) 32 bills had been returned to the White House for action by the President with the recommendations of the Budget Bureau and other interested departments before September 7. Of these, 26 were signed on September 8,

reading "Presented to the President Sep 7, 1959." With respect to the use on this occasion of both these stamps, the Deputy Assistant to the President, Mr. Gerald D. Morgan, and the White House Executive Clerk, Mr. William Hopkins, played important parts.

Prior to his departure, President Eisenhower had indicated his desire that, so far as possible, he wanted Congressional bills to be held in Washington until his return to the United States. Mr. Morgan and Mr. Hopkins discussed this matter and decided that, to accomplish the President's objective, the bills received during his absence should be stamped "Held for presentation to the President upon his return to the United States." This was the first time such wording had been used. Mr. Morgan was aware that, on previous occasions of a President's absence from the country during times Congress was in session, receipt stamps had been used by the White House reading in effect, "Received at the White House for forwarding to the President." However, he felt that such wording involved at least a moral obligation to forward bills which, in view of a tight and busy schedule in Europe, the President desired to avoid as far as possible. Therefore, the "Held for presentation" language was used instead of the "Received * * * for forwarding" language.

Also, Mr. Morgan and Mr. Hopkins decided that all bills received during the President's absence and stamped "Held for presentation" were to be stamped "Presented to the President Sep 7, 1959" which was the date of President Eisenhower's return to the United States. However, the stamp was not placed upon the bills at that time. Instead, it was

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six were signed on September 9, and one (H.R. 2717) was returned to the House of Representatives with a veto message on September 14;

(b) Ten were returned for action by the President on September 7, nine of which were signed on September 9 and one was signed on September 14;

(c) 14 were returned by the Budget Bureau for Presidential action on September 8, ten of which were signed on September 9, three were signed on September 14, and one failed to become law by virtue of a "pocket veto";

(d) Two were returned by the Budget Bureau for Presidential action on September 9, one being signed on September 14 and the other on September 16;

(e) One was returned by the Budget Bureau for Presidential action on September 10 and signed by the President on the same day.

(f) Three were returned by the Budget Bureau for Presidential action on September 11 and signed by the President on September 14;

(g) Three were returned by the Budget Bureau for Presidential action on September 12, one of which was signed on September 14 and two were signed on September 16.

stamped on each bill by a White House legislative clerk (such as Tom Jones) after it had been acted upon by the President and had been returned by the Executive Clerk to the Records Office for forwarding to National Archives in case of a signed bill, or to the originating house of Congress in case of a veto.

Although President Eisenhower did not personally attend to the details of the selection of the language on the "Held for presentation * * *" stamp or other administrative details in regard to the procedures to be followed, the President did in effect approve these procedures and did make the decision as to the handling of bills delivered during his absence. See finding 8.

IV. HISTORICAL FACTS REGARDING BILL PRESENTATION PROBLEM IN OTHER INSTANCES.

A. General

18. Prior to 1961, the only Presidents who had gone outside the continental limits of the United States while Congress was in session were Presidents Taft, Wilson, Coolidge, Franklin D. Roosevelt, Truman, and Eisenhower. Moreover, bills have been delivered to the White House by the Congress only during absences of Presidents Wilson, Roosevelt, Truman, and Eisenhower. Hence, the handling of bills delivered to the White House while the President is absent from the United States is a relatively recent problem.

19. During the absences from the United States of Presidents Wilson, Roosevelt, Truman, and Eisenhower, referred to in the preceding finding, a little over 800 bills were delivered to the White House while Congress was in session. The overwhelming majority of those bills were either signed or vetoed by the President then in office within ten days (Sundays excepted) after delivery of the bills to the White House by the appropriate Senate or House committee. Somewhere between one and two percent of the bills so delivered were signed or vetoed by the President in office at the time more than ten days (Sundays excepted) after delivery to the White House. Most of those bills acted upon by the President after the expiration of ten days (Sundays excepted) from delivery to the White House were approved, but a few were vetoed. Those vetoes were never challenged by Congress, or in the courts until the present case involving H.R. 2717.

B. President Woodrow Wilson

20. During President Wilson's absence from the United States for the period March 5, 1919 to July 8, 1919, five bills were delivered by Congress to the White House. The *Congressional Record* entries reflecting delivery of these bills state either "* * * presented to the White House, for the approval of the President * * *" or "* * * presented to the President of the United States, for his approval * * *" None of the bills contains the notation "Presented to the President." All five bills were forwarded to President Wilson and acted upon by him while he was outside the United States. One of them was signed within ten days (Sundays excepted) after its delivery to the White House, and the other four were signed more than ten days (Sundays excepted) after their delivery to the White House. The bills were published in the United States Statutes at Large as public laws bearing the dates on which the President signed them.

C. President Franklin D. Roosevelt

21. During his incumbency, President Roosevelt was outside the continental limits of the United States while Congress was in session on 19 different occasions. No bills were delivered to the White House during five of these trips. On the remaining 14 trips, however, 343 bills were delivered to the White House, and all but three[28] of those bills were signed[29] or vetoed within ten days (Sundays excepted) after the date of delivery to the White House.

Fifty-one of the 343 bills were delivered to the White House while President Roosevelt was outside the United States attending the Cairo and Teheran Conferences from

[28] A fourth possibility exists as to which the record is not clear. S.J. Res. 59 was delivered to the White House on November 18, 1943. Ten days (Sundays excepted) from November 18, 1943 expired on November 30, 1943. The President's veto message commencing "I return herewith, without my approval, S.J. Res. 59 * * *" bears the date of November 25, 1943. At the end of the veto message, there appears a notation in handwriting resembling the President's signature, which notation reads "This joint resolution was presented to me on Nov. 25, 1943." While it does not expresaly state the date on which the unsigned bill and veto message were returned to the Senate, the *Congressional Record* for December 1, 1943, contains a notation of messages received from the President, a notation of messages received from the House, and then the veto message for S.J. Res. 59.

[29] Sixty-five of the bills were signed by the President while he was outside the United States.

November 13, 1943 to December 16, 1943. This appears to have been the first time that the procedure was used of receiving a bill at the White House "for forwarding to the President."

Prior to the President's departure, the then Attorney General, Francis A. Biddle, by a memorandum dated November 10, 1943, advised President Roosevelt of his views on the constitutionality of various methods of handling bills delivered during a President's absence. In discussing the possibility of receiving bills at the White House for forwarding to the President, the Attorney General stated:

> The practice of receiving bills at the White House and forwarding them for presentation may also require a measure of cooperation. Probably the custom of treating delivery to the White House as presentation to the President should be negatived by informal Presidential advice to the Vice-President and the Speaker that persons at the White House will, during a given period, be authorized only to forward, and not to receive on behalf of the President, enrolled bills. Such directions should be reflected in the reports of the Committee on Enrollment to their respective Houses announcing the date of presentation of bills to the President. The usual practice is that the committee of the originating House makes the report, which is inserted in the Congressional Record. A special form appears to have been used on some occasions in the Record during President Wilson's absence. E.g., "Mr. Ramsey, from the Committee on Enrolled Bills, reported that this day they had presented to the White House for the approval of the President of the United States the following joint resolution and bill:" 58 Cong. Rec. 662. The usual form recites presentation "to the President." The variant there used would appear to be adequate as a technical matter, though it might be better to use the phrase "delivered to the White House for transmittal to the President" if not too conspicuous. There remains the problem of public misapprehension as to the running of the 10-day period. If announcement of the President's absence were made within 10 days of the delivery of the bill to the White House, such misapprehension would be avoided.
>
> Upon receipt of a bill at the White House, it might be withheld instead of being forwarded forthwith, particularly where circumstances made its ultimate delivery or ultimate timely return unsure, or where the time

required for return would largely consume the period intended for deliberation. Here too some appropriate form of report for the Record would be necessary—*e.g.*, "delivered to the White House for presentation to the President [on his return]." The bracketed words could be used if prior announcement of absence had been made.

In a Memorandum for the Vice-President and the Speaker of the House dated November 10, 1943, President Roosevelt stated as follows:

> As I expect to be away from Washington for some time in the near future, I hope that insofar as possible the transmission of completed legislation be delayed until my return. The White House Office, however, in other cases of emergency has been authorized to forward to me any and all enrolled bills or joint resolutions. They will be forwarded at once by the quickest means. The White House Office will not receive bills or resolutions on behalf of the President but only for the purpose of forwarding them. As soon as received by the President their presentation to the President will have been completed in accordance with the terms of the Constitution. *I suggest, therefore, that if any bill is forwarded to the White House, the entries on the House and Senate Journals show "delivery to the White House for forwarding to the President".*
>
> For security reasons I hope that this can be kept confidential for as long as is necessary. (Emphasis in original.)

The 51 bills received at the White House during this period were the subject of entries in the *Congressional Record* reading, in case of the House, "did deliver to the White House for forwarding to the President for his approval * * *", and reading, in case of the Senate, "presented to the President of the United States the following * * *". On several of these, there appears, either on the enrolled bill itself or on the veto message in certain instances, the notation "Presented to me" followed by a date differing from the date of delivery to the White House and usually, but not always, the same as the date upon which the President acted upon the bill. It is not disputed that President Roosevelt acted upon two of these 51 bills more than ten days (Sundays excepted) after their delivery to the White House.

H.R. 1155 was delivered to the White House on November 12, 1943. Ten days from that date (Sundays excepted)

expired November 24, 1943. H.R. 1155 was returned unsigned with a veto message on December 1, 1943. The bill is stamped with a White House receipt stamp under which is a handwritten notation "For Forwarding." The veto message is dated November 25, 1943, and bears a handwritten notation, "This bill was presented to me on Nov. 25."[30] Except for referral back to committee, the House took no further action on H.R. 1155, and it was never published as law.

S. 861 was delivered to the White House on December 4, 1943. Ten days from that date (Sundays excepted) expired on December 16, 1943. President Roosevelt signed the bill on December 17, 1943. Above his signature in handwritting resembling the signature are the notations "Presented to me/Dec. 17, 1943/Approved/Dec. 17, 1943." S. 861 was published in the United States Statutes at Large as Public Law 202, bearing the date December 17, 1943.

The only other bill out of the 343 bills delivered to the White House during President Roosevelt's absences which he signed or vetoed more than ten days (Sundays excepted) after delivery to the White House was S. 338.[31] This bill was delivered to the White House on February 15, 1945, while President Roosevelt was attending the Crimea-Yalta Conference. Ten days from that date (Sundays excepted) expired on February 27, 1945. The President signed the bill on February 28, 1945. It contains a handwritten notation (obviously not the handwriting of the President) reading "Presented to the President/February 28, 1945." S. 338 was published in the United States Statutes at Large as Public Law 12, bearing the date February 28, 1945.

D. President Harry S. Truman

22. During his incumbency, President Truman was outside the continental limits of the United States while Congress was in session on eight different occasions. During three of these eight trips, 93 bills were delivered to the White House. No bills were delivered during the other trips. The great majority of these bills were delivered during President

[30] Both the handwritten notations on the bill and on the veto message bear a resemblance to the President's signature. However, there is no evidence in the record with respect to this.

[31] Cf. comment on S.J. Res. 59 contained in footnote 9, *supra*.

Truman's absence from the United States July 6, 1945 to August 7, 1945, while attending the Potsdam Conference. More than three-fourths of these enrolled bills bear a notation in the left margin reading "Presented to the President", followed by a date differing from the date of delivery of that bill to the White House, and being the same date the President acted upon the bill. They contain no qualifying receipts or stamps such as "Held for presentation to the President upon his return to the United States," "Received for forwarding to the President," and the like. The *Congressional Record* reflected the delivery of the House bills with the language "did on ------(date)------- present to the President for his approval * * *" and the Senate bills with the language "presented to the President of the United States the following * * *"

It is undisputed that all but eight of the 93 bills delivered to the White House while President Truman was outside the United States were signed or vetoed by the President within ten days (Sundays excepted) after the date of delivery of the bills to the White House. Of the 80 bills delivered during the Potsdam trip, all but four were signed or vetoed by President Truman on various dates while he was outside the United States.

The eight bills regarding which the parties do not agree as to the nature of the Presidential action thereon are H.R. 246, H.R. 2866, H.R. 3175, H.R. 2699, H.R. 3549, H.R. 3477, H.R. 952, and H.R. 1856. It is agreed that H.R. 246, H.R. 2866, and H.R. 3175 were delivered to the White House on Monday, July 23, 1945, and that H.R. 2699 was delivered to the White House the following day. On the face of these four enrolled bills appears the notation "Presented to the President/August 8, 1945," and President Truman signed these bills on August 8, 1945.

The House of Representatives, pursuant to House Concurrent Resolution 68, had adjourned conditionally on July 21, 1945. House Concurrent Resolution 68 provided for adjournment until October 8, 1945, unless the President *pro tempore* of the Senate and the Speaker of the House of Representatives should sooner notify the members to reassemble. The Senate adjourned conditionally on August 1, 1945. The Congress reassembled on September 5, 1945, and the

first session of the 79th Congress was not adjourned *sine die* until December 21, 1945.

The plaintiff considers that H.R. 246, H.R. 2866, H.R. 3175, and H.R. 2699 must be deemed as signed (approved) by the President, and they were, in fact, published in the United States Statutes at Large as Private Laws 184–187, each bearing the date of August 8, 1945. On the other hand, defendant suggests that because of the "conditional adjournment" of Congress referred to above, these four bills may have been pocket vetoed if the date of delivery to the White House were the date of presentation to the President within the meaning of the Constitution.[32]

H.R. 3549 was delivered to the White House on July 18, 1945. Ten days from that date (Sundays excepted) expired on July 30, 1945. President Truman returned the bill to the House of Representatives without signing it and with his veto message dated July 31, 1945. The unsigned bill and veto message were returned to the House on August 4, 1945. The bill and the message were referred back to committee, and no further action was taken by Congress.

H.R. 3477 was delivered to the White House on July 18, 1945. The enrolled bill has a stamped notation in the left margin reading "Presented to the President/July 28, 1945," with the numeral "28" written in ink. President Truman's message of disapproval commencing "I return herewith, without my approval, H.R. 3477 * * *" is dated July 28, 1945, with the numeral "28" again written in ink. The *Congressional Record* entry reflecting the return of the unsigned bill indicates that the bill and veto message were received in the office of the Clerk of the House of Representatives on July 31, 1945, and delivered by the clerk to the Speaker on September 5, 1945. The bill and veto message were referred to committee, and the House took no further action with respect to H.R. 3477. Ten days from the date

[32] When the signed bills were transmitted to the State Department for numbering and promulgation as laws, this legal question was considered, and according to a file memorandum of August 8, 1945, it was finally decided that if the question whether these four bills were pocket vetoes or laws should arise after promulgation of the bills as laws, it would be up to Congress and the White House to defend their positions and that the question was one that would have to be decided by the courts. Thereupon, it was determined to publish the bills as laws "in the usual manner."

of delivery of H.R. 3477 to the White House (Sundays excepted) expired on July 30, 1945.

H.R. 952 and H.R. 1856 were delivered to the White House on July 23, 1945. Ten days from that date (Sundays excepted) expired on August 3, 1945. The two enrolled bills have notations in the left margin stating "Presented to the President/July 31, 1945." President Truman's veto messages commencing "I return herewith without my approval * * *" each bear the date July 31, 1945. According to the *Congressional Record* entries, the unsigned bills and veto messages were returned to the House on August 4, 1945, and August 5, 1945, respectively.

E. President Dwight D. Eisenhower

23. During his incumbency, President Eisenhower was outside the continental limits of the United States while Congress was in session on ten different occasions. During eight of these ten trips, 371 bills[33] were delivered to the White House. No bills were delivered during the other two trips. With the exception of H.R. 2717 (the bill at issue herein), S. 994, and possibly H.R. 6596,[34] all of the bills delivered to the White House while President Eisenhower was outside the United States and Congress was in session were signed or vetoed by the President within ten days (Sundays excepted) after the date of delivery of the bills to the White House.

Prior to President Eisenhower's departure for the Geneva Conference on July 15, 1955, the then Attorney General, Herbert Brownell, Jr., in a letter to the President dated July 5, 1955, suggested that arrangements be made with Congressional leaders to hold enrolled bills in Congress until the President's return or, if the matter warranted immediate attention by the President, the entries on the House and Senate Journals should carry the statement "Delivery to the White House for forwarding to the President." He further recommended that the White House office be advised that it should not receive bills on behalf of the President but that the bills should be marked "Received for forwarding * * * to the President." However, while the White

[33] This figure includes the 72 bills previously discussed under heading III of these findings, *supra*.

[34] See the discussion of this possibility contained in footnote 5, *supra*.

House stamp "Received for forwarding to the President" was used on the 115 bills delivered during this trip, as well as on the White House receipts for the bills, the *Congressional Record* entries continued to read for the House bills "did on ------(date)------ present to the President for his approval * * *" and for the Senate bills "presented to the President of the United States the following * * *."[35]

Certain bills delivered to the White House during the President's 1960 Far East trip were stamped "Held for presentation to the President upon his return to the United States." Subsequently, these bills were stamped "Presented to the President on June 26, 1960," the date the President upon his return had arrived in Hawaii. This procedure was in keeping with the views of Mr. Morgan and Mr. Hopkins, referred to in findings 15 and 17, *supra*, that the "Held for presentation" stamp had the effect of tolling the ten-day period only until the President returned to the United States at which time the bills should be stamped "Presented to the President" with the date of his arrival in the United States.

CONCLUSION OF LAW

Upon the foregoing findings of fact, which are made a part of the judgment herein, the court concludes as a matter of law that plaintiff is not entitled to recover and its petition is therefore dismissed.

---

[35] The entries in the *Congressional Record* were the same in the case of all but 17 of the 371 bills delivered to the White House during President Eisenhower's absences from the United States. In the case of these 17 bills, the entries read "did on (*date*) deliver to the White House for presentation to the President, for his approval * * *".

APPENDIX C

(See Opposite ☞)

Memorandum of Attorney-General Brownell

July 5, 1955

The President,

The White House.

My dear Mr. President:

It is suggested that you confer with leaders in Congress so that arrangements can be made under the law for enrolled bills or joint resolutions to be held in Congress until your return.

In this way, your attention to the important matters raised in Summit Talks will not be diverted by consideration of bills which may safely await your return.

If Congressional leadership believes that the matter is serious enough to warrant your immediate attention, it should be advised to forward the bill to the White House with this understanding:

1. That the entries on the House and Senate Journals will carry the statement: "Delivery to the White House for forwarding to the President."

2. That the White House Office will be advised that it will not receive bills or resolutions on behalf of the President but they will only be "received for forwarding them to the President".

3. That where the President acts on an emergency measure his decision will be communicated not only by carrier but also by cable.

This procedure would be used in order that in event of a veto the Congress could receive as much notice as possible to permit it to act.

Respectfully,

Herbert Brownell, Jr.
Attorney General

Appendix C

Colloquy, 105 Congressional Record 19553-54 (September 14, 1959)

Purported Veto of House Bill 2717

Mr. Keating: Mr. President, I rise to propound a parliamentary inquiry: On March 17, 1959, the House of Representatives passed, and on August 27, 1959, the Senate passed, House bill 2717, for the relief of Eber Bros. Wine & Liquor Corp.

The bill was sent to the White House on August 31, 1959. However, I am informed that it was not brought to the President's personal attention, by his staff, until approximately 5 days ago. The President has today disapproved the bill and returned it here.

In view of the fact that the bill was delivered to the White House on August 31—more than 10 days ago—my first inquiry is whether more than 10 days have expired since the bill was presented to the President within the provisions of article I, section 7, of the Constitution.

The Presiding Officer: In response to the parliamentary inquiry, the Parliamentarian advises that, under the practice, if a bill is delivered to the President as of this date, the time would commence to run as of midnight tonight, in other words, counting tomorrow as the first day, Sundays excluded.

Mr. Keating: In other words, if the bill was delivered to the White House before midnight, August 31, 10 days would have expired by now?

The Presiding Officer: The time would start the next day after the 31st. That date would be the first day. The Chair does not have a calendar available here.

Mr. Keating: The ruling of the Chair is in accordance with my understanding. Do I understand from that statement that we are not operating under a procedure whereby

if the staff of the President held a bill and presented it to him personally at some later time, the 10 days would start running then?

The Presiding Officer: That is not a matter for the Chair to determine.

Mr. Keating: My second parliamentary inquiry, Mr. President, is whether the bill which was delivered to the White House on August 31, and has today been disapproved and returned here, automatically became law upon the expiration of the 10-day period, excluding Sundays, without being returned by the President to the Congress.

The Presiding Officer: The Chair is advised that the Constitution is clear on that point. Anything beyond what the Chair has answered is a matter for the courts to decide. The Chair has already said that if the bill is delivered before midnight, the first day would start on the day after midnight, and Sundays are excluded from the computation.

Mr. Keating: May I propound a third and final parliamentary inquiry?

The Presiding Officer: The Senator will state it.

Mr. Keating: My question is whether the status of a bill passed by the Congress is affected in any way by the President's purported veto of the bill this morning, more than 10 days after it was delivered at the White House.

The Presiding Officer: The Chair states that if the President has vetoed the bill, it being a House bill, it will go back to the House for further action. If the House overrides the veto, it will be submitted to the Senate, and there will be an opportunity to act upon it.

Mr. Keating: But my inquiry is whether the action of the President more than 10 days after the bill was delivered to him is an action which will be recognized by the Congress.

Appendix C

The Presiding Officer: The Senate is unable to act until the House has acted upon the matter. If the House overrides and sends the bill to the Senate with the message that the House has overridden the veto, that would be a matter for the Senate to determine.

Mr. Keating: My inquiry, which the Chair may be unwilling or should refrain from responding to, is this: Is any action by the Congress necessary if the President retains a bill for more than 10 days before he acts on it?

The Presiding Officer: According to the Constitution, the bill should become a law if it has not been acted upon within 10 days after it has been presented to the President. The matter of whether 10 days have elapsed is a question for legal determination, and not for the Chair to determine.

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766-834—65

In the Supreme Court of the United States

OCTOBER TERM, 1964

No. 825

EBER BROS. WINE & LIQUOR CORPORATION, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the Court of Claims (Pet. App. B, 1–42) is reported at 337 F. 2d 624.

JURISDICTION

The judgment of the Court of Claims was entered October 16, 1964. The petition for a writ of certiorari was filed January 14, 1965. The jurisdiction of this Court is invoked under 28 U.S.C. 1255(1).

QUESTION PRESENTED

Whether the court below correctly held that, in light of the particular circumstances involved in this case, the President's veto of a private relief bill

was exercised within the 10 day period prescribed by Article I, Section 7, Cl. 2 of the Constitution.

CONSTITUTIONAL PROVISION INVOLVED

Article I, Section 7, Cl. 2 of the Constitution of the United States provides:

> Every Bill which shall have passed the House of Representatives and the Senate, shall, before it becomes a Law, be presented to the President of the United States; If he approves he shall sign it, but if not he shall return it, with his Objections to that House in which it shall have originated, who shall enter the Objections at large on their Journal, and proceed to reconsider it. If after such Reconsideration two thirds of that House shall agree to pass the Bill, it shall be sent, together with the Objections, to the other House, by which it shall likewise be reconsidered, and if approved by two-thirds of that House, it shall become a Law. But in all such Cases the Votes of both Houses shall be determined by yeas and Nays, and the Names of the Persons voting for and against the Bill shall be entered on the Journal of each House respectively. If any Bill shall not be returned by the President within ten Days (Sundays excepted) after it shall have been presented to him, the Same shall be a Law, in like Manner as if he had signed it, unless the Congress by their Adjournment prevent its Return, in which Case it shall not be a Law.

STATEMENT

This suit was brought by petitioner in the Court of Claims for a refund of an income tax overpayment.

It is undisputed that unless H.R. 2717, 86th Congress (a private bill for the relief of petitioner) became law upon the expiration of ten days (Sundays excepted) after presentment to the President, petitioner's claim is barred by the statute of limitations. If H.R. 2717 did become law, petitioner admittedly is entitled to recover.

H.R. 2717 passed the House of Representatives on March 17, 1959 and the Senate on August 27, 1959 (Finding 2; Pet. App. B, 22). The purpose of the bill, as already noted, was to waive the statute of limitations as to petitioner and allow its claim to be considered on the merits (Pet. App. A, 1a; Finding 2; Pet. App. B, 22). On August 31, 1959, in accordance with the customary procedure, the bill was delivered to the White House by a messenger of the House of Representatives.

At that time, President Eisenhower was outside the United States on an official visit to various NATO countries. He had departed on August 26 and did not return until September 7, 1959. Prior to his departure, the President had sent one of his assistants to discuss with Congressional leaders the matter of handling legislation during the President's absence. The Congressional leaders were informed that clerks at the White House had been instructed to stamp on all bills delivered by Congress while the President was away, and on all receipts for such bills, the words "Held for presentation to the President upon his return to the United States." (Finding No. 8; Pet. App. B, 25–26.)

Notwithstanding these instructions, on August 31,

1959, when H.R. 2717 was brought to the White House, the legislative clerk inadvertently failed to stamp on it the words "Held for presentation to the President upon his return to the United States." Instead, he signed the receipt as he normally did when the President was not away. Later that same day, when he became aware of his oversight he attempted to add to the receipt the "Held for presentation * * *" language. This fact was brought to the attention of the House (Finding 9; Pet. App. B, 26–28).

The Journal of the House and the Congressional Record for August 31, 1959 contained the statement that the Committee on House Administration "did on this day present to the President for his approval a bill of the House of the following title: * * * H.R. 2717 * * *." Except for H.R. 2717 and other bills delivered to the White House at the same time, all bills delivered during the President's absence, both prior to and after August 31, 1959, were stamped with the "Held for presentation * * *" language. The delivery of House bills indorsed with this stamp was reflected in the House Journal and Congressional Record with the notation "did * * * deliver to the White House for presentation to the President, for his approval * * *" rather than with the notation, "did * * * present to the President for his approval * * *", used for H.R. 2717 and the other bills delivered at the same time (*ibid.*).

On September 7, 1959, the date of President Eisenhower's return to the United States (Finding 8; Pet. App. B, 25), a stamp was placed on H.R. 2717 stating

that it was presented to the President on that date (Finding 10; Pet. App. B, 28). Seven days later, on September 14, 1959, H.R. 2717 was returned to the House of Representatives by the President with a veto message.[1] It was neither reconsidered by the House nor published as a private law. Congress was in session at all times relevant to these happenings and did not adjourn until the early morning of September 15, 1959 (Finding 11; Pet. App. B, 28).

Petitioner contended in the Court of Claims that the delivery of the bill to the White House on August 31, 1959, started the running of the ten-day period prescribed by the Constitution for the vetoing of a bill, and that the veto on September 14, 1959, was therefore untimely and ineffective. The Court of Claims, in a comprehensive and well reasoned opinion by Judge Davis, rejected petitioner's contention. The court held that the President's veto operated to prevent H.R. 2717 from becoming law and that petitioner's claim was therefore barred. The court stated that "though personal presentation to the President is not mandatory, either the Congress or the President can insist on such delivery. If personal delivery is not demanded by either side, presentation can be made in any agreed manner or in a form established by one party in which the other acquiesces" (Pet. App. B, 8). Applying that principle to the instant case, the Court of Claims concluded that the President was free to decide that bills delivered to the White House during his absence from the United

[1] The President's veto message is set out in 105 Cong. Rec. (Part 15) 19697, 86th Cong., 1st Sess., Sept. 14, 1959.

States would be held for presentation to him upon his return and that since Congress was informed of this procedure and took no action to accelerate presentation or effect personal delivery, it must be taken to have acquiesced in that arrangement.

ARGUMENT

While, as the court below noted (Pet. App. 4), the problem presented by the case "cannot be dismissed as transient" and "will doubtless endure," we do not believe the question is likely to be sufficiently recurrent to warrant consideration by this Court at the present time. Furthermore, whether the particular private bill involved here was validly enacted is in itself a question of trivial significance. In any event, the decision below is clearly correct. Accordingly, we submit that there is no occasion for review by this Court.

1. While this Court has never passed upon the precise issue presented here, its prior decisions under the veto clause of the Constitution (Art. I, Sec. 7, cl. 2) have laid down the basic principles which control this case. "The constitutional provisions have two fundamental purposes; (1) that the President shall have suitable opportunity to consider the bills presented to him, and (2) that the Congress shall have suitable opportunity to consider his objections to bills and on such consideration to pass them over his veto provided there are the requisite votes." *Wright* v. *United States,* 302 U.S. 583, 596 (1938). See, also, *Edwards* v. *United States,* 286 U.S. 482, 486, 493 (1932); *The Pocket Veto Case,* 279 U.S. 655, 677–

678 (1929); *La Abra Silver Mining Co.* v. *United States*, 175 U.S. 423, 454–455 (1899). The first purpose is no less important than the second. "Regard must be had to the fundamental purpose of the constitutional provision to provide appropriate opportunity for the President to consider the bills presented to him. The importance of maintaining that opportunity unimpaired increases as bills multiply." *Edwards* v. *United States*, *supra*, 286 U.S. at 493. "The power thus conferred upon the President cannot be narrowed or cut down by Congress, nor the time within which it is to be exercised lessened, directly or indirectly." *The Pocket Veto Case*, 279 U.S. at 677–678.

The rule adopted by the court below would accommodate the dual objectives of the veto clause, whereas that contended for by petitioner would sacrifice the first (*i.e.*, the President's opportunity to consider bills) to the second (the opportunity of Congress to reconsider and repass them over his veto). Under the Court of Claims' rule, either the President or Congress is free to insist that bills be delivered to the President personally by Congressional courier. In the alternative, the President may require (as in the instant case) that if a bill is delivered to the White House, its "presentation" be delayed until his return to the country. In the latter event, if Congress is unwilling to brook the delay, it may send the bill to the President by its own messenger, thereby assuring that the running of the constitutional ten-day period will be deferred no longer than necessary to make the delivery.

And both the President and Congress are willing to accept a less demanding method of presentation, they may agree to, or acquiesce in, another mutually satisfactory procedure. In that way, the President's opportunity for mature deliberation is preserved without detriment to the Congressional interest in obtaining prompt return of vetoed bills.

Petitioner argues, however, that delivery of the bill to the White House is tantamount to "presentation" and automatically sets in motion the ten-day period for Presidential action. This conclusion is plainly not demanded by the language of the Constitution, which requires that bills be presented to the President, not merely that they be deposited at the White House. Moreover, in any case in which the President is absent from the country for a period of several days, the effect of petitioner's proposal would be to curtail the time available to him for studying the bill, or, indeed, preclude the exercise of the veto altogether. In the instant case, for example, President Eisenhower returned to the United States seven days after the bill was delivered to the White House and, under petitioner's rule, would have had only three days in which to examine the bill before it automatically became law.

It is true, as petitioner points out, that under the long-standing practice prior to 1959, delivery to the White House was treated as presentation to the President. Petitioner argues that the power to alter that practice and to delay presentation during a necessary presidential absence resides solely in Congress.

This contention, we submit, flies in the face of this Court's declaration that the veto power may not be "narrowed or cut down by Congress, nor the time within which it is to be exercised lessened" (*supra*, p. 7). We do not say, of course, that the President may unilaterally modify the presentation procedure without advising Congress and giving it an opportunity to insist upon immediate personal presentation by messenger. In the instant case, however, it is clear that Congress was informed of the method selected by President Eisenhower for handling bills during his absence. A presidential aide discussed the matter with Congressional leaders and told them that incoming bills would be stamped with the language "Held for presentation to the President upon his return to the United States" (Pet. App. 26). Moreover, following the delivery of H.R. 2717 and 12 other House bills to the White House, the delivery of all subsequent bills during the same presidential absence was reported in the House Journal and the Congressional Record with the words "did * * * deliver to the White House for presentation to the President, for his approval * * *." (Pet. App. 29.) Congress made no effort to expedite presentation or to make personal delivery to the President in Europe. In these circumstances, the Court of Claims was plainly warranted in its conclusion that Congress had acquiesced in the procedure instituted by the President. In any event, the question whether in this particular instance Congress acquiesced in the specific method of presentation adopted by President Eisenhower is essentially a fac-

tual question without intrinsic or long-term importance and does not merit review by this Court.

2. Petitioner's reliance upon *Wright* v. *United States*, 302 U.S. 583, is misplaced. In *Wright*, the Court held that the President could return a bill to the Senate, even during a three-day recess of that body, by delivering it to the Secretary of the Senate. As the court below pointed out, however (Pet. App. 14), the Secretary was "the accredited agent of the legislative body" (302 U.S. at 590), authorized to receive such messages from the President, whereas the White House clerk in the the present case plainly had no authorization to accept "presentation" on the President's behalf, but was empowered merely to hold the bill for later presentation upon the President's return. A further significant distinction is the fact that, whereas the President has a ten-day time limit within which to act upon a bill, the Senate is under no such limitation in deciding whether to repass a measure over the President's veto. It is true that the Court noted in *Wright* that the difficulty in returning a bill to one of the two Houses while in recess is no greater "than in presenting a bill to the President by sending it to the White House in his temporary absence" (302 U.S. at 590). That language had reference to the then prevailing practice of treating delivery to the White House as equivalent to presentation, but it in no way implied that the President was without power to modify the practice in order to ensure that the full ten-day period would be available for considering bills. There was no comparable consideration which might have served to justify a re-

quirement that the President return the bill to Congress only when it was actually in session.

CONCLUSION

For the reasons stated, the petition for a writ of certiorari should be denied.

Respectfully submitted.

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IN THE

Supreme Court of the United States

October Term, 1964

No. 825

EBER BROS. WINE & LIQUOR CORPORATION,
Petitioner,

v.

THE UNITED STATES,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Claims

REPLY BRIEF FOR PETITIONER

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IN THE

Supreme Court of the United States

October Term, 1964

No. 825

EBER BROS. WINE & LIQUOR CORPORATION,
Petitioner,

v.

THE UNITED STATES,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Claims

REPLY BRIEF FOR PETITIONER

The Government's Brief in Opposition achieves the virtue of brevity by foregoing any effort to answer the points raised by the Petition. Indeed, the most significant aspect of the Government's Brief is what it omits.

1. *Respondent Does Not Defend the Rationale Below.* The principal omission in the Brief in Opposition is that it neither explains nor defends the rationale of the decision below. As pointed out in the Petition (pp. 15-17), the decision below did not interpret Article I, Section 7, clause 2 as giving the President unqualified power to require

"personal presentation." Such a construction, the Court noted, would enable the President to stultify the legislative process (Opinion, p. 8). Accordingly, the President's power to insist upon personal presentation, the Court said, required the President (a) to remain "reasonably available" for presentation, and (b) to inform the Congress that personal presentation was indeed required.

The Petition contends that, with those qualifications, the rule as announced below is utterly unworkable (Petition, pp. 23-27). The Government's Brief:

> (1) makes no mention whatever of the requirement that the President be "reasonably available";
>
> (2) makes no effort to meet Petitioner's argument that either of the two qualifications on the "personal presentation" rule make any such rule wholly unworkable; and
>
> (3) does not undertake to defend the unqualified or absolute "personal presentation" rule rejected by the court below.

In short, Respondent asks this Court to leave standing as the sole judicial precedent for the guidance of Presidents and Congresses a decision whose unworkability is not denied, and whose rationale is essentially undefended.

2. *"Informing" the Congress.* The Petition devoted several pages to the proposition that the *kind* of evidence upon which the Court below concluded that Congress was "informed" of President Eisenhower's "new procedure" *in and of itself* demonstrates the unworkability of the Court's rationale (Petition, pp. 25-27). Respondent ignores

the point entirely. It states only its conclusion that Congress was informed (Brief in Opposition, p. 9). Respondent does not attempt to explain how the country is to *know* whether laws have been passed[1] if the determinative question of whether Congress was informed is to be resolved not by reference to any official record, but upon oral testimony, to be given in law suits years later, as to private and confidential conversations between Presidential aides and one or more unidentified "Congressional leaders".[2]

3. *The "Acquiescence" of Congress.* The Government relies heavily on the statement of the Court below that Congress "acquiesced" in the President's "new procedure". As the Petition pointed out, the statement cannot be considered an independent ground of decision since it assumes the very power of the President in dispute (Petition, pp. 28-29). Respondent does not address itself to this argument. It asserts only that the conclusion of "acquiescence" is "essentially * * * factual" and in itself does not merit review (Brief in Opposition, pp. 9-10). As the Petition makes clear (pp. 28-29), the conclusion is wholly without basis in fact. Petitioner does not, however, seek review as to that conclusion itself but only as to the underlying Constitutional power which it assumes (see Petition, pp. 28-29).

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1. See *The Pocket Veto Case*, 279 U. S. 655, 684-85 (1929); *Wright* v. *United States*, 302 U. S. 583, 595 (1938), for this Court's traditional view of the importance of public certainty as to the status of bills.

2. If such testimony is given at all. The former Presidential aide in this case successfully claimed Presidential privilege when asked to divulge the substance of his "discussion" with "Congressional leaders." Finding 8.

4. *The Importance of the Question.* The Government concedes that "the precise issue presented here" has never been passed upon by this Court, and that it "cannot be dismissed as transient" and "will doubtless endure." It nevertheless argues that it "do[es] not believe the question is likely to be *sufficiently recurrent*" to merit consideration by this Court at this time (Brief in Opposition, p. 6) (italics supplied).

The issue presented by this case is what constitutes "presentation" of a bill to the President within the meaning of Article I, Section 7, clause 2. That issue arises often enough when the President is absent from the country, as the twenty-year history of concern by the Department of Justice itself over this very matter indicates (Petition, p. 14 n. 20). Moreover, the Constitutional rule asserted by the Court of Claims is not limited to cases of Presidential absence abroad (Petition, pp. 17-18). Under the rule of the decision below, the question here presented is potentially present as to every bill passed by Congress and not delivered personally to the President—*i.e.*, as to *every* bill.

The Government suggests that the Court should not grant the Petition because the Constitutional issue is presented by a private bill which is itself of "trivial significance". We raise the question of whether any bill enacted by both Houses of Congress can Constitutionally be regarded as of "trivial significance." The fact is that *all* of the cases cited by the Government at pages 6-7 of its Brief, in which this Court has interpreted other aspects of Article I, Section 7, have also involved private bills.

The point is that the significance or insignificance of the bill has nothing to do with whether this Court should grant review: we do not ask this Court to review a decision interpreting the bill, but a decision interpreting a Constitutional provision which is applicable to *all* bills, public and private, important and not-so-important, including appropriations measures, declarations of war, civil rights measures, bills establishing or limiting the jurisdiction of the federal judiciary, and other measures for the general welfare.[3]

It is, perhaps, fortunate that the question arises in the context of a private bill. But the Government's position is, in essence, that this Court should decline to resolve an important Constitutional question which concededly will recur, in the bizarre hope that *next time* the problem will arise as to a measure of great national importance. We respectfully submit that certiorari should be granted to prevent precisely that occurrence.

Conclusion

Respondent's Brief in Opposition fails either to defend the rationale below, to offer any *other* rationale or to meet the grave questions posed by the Petition. We respectfully submit that Respondent has done none of these things because it can do none: because the rationale below is indefensible, because no other rationale can support the deci-

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3. Thus, although *The Pocket Veto Case*, 279 U. S. 655 (1929), also involved a private bill, certiorari was there granted "in view of the *public* importance of the question presented." 279 U. S. at 673 (italics supplied). See also *Wright* v. *United States*, 302 U. S. 583, 586 (1938).

sion below and because the questions posed by the Petition are unanswerable in the context of that decision. We respectfully urge that the Petition for a writ of certiorari be granted.

Respectfully submitted,

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March 23, 1965.